Petition

81-1717

No. .....

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

AMERICAN BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

PETITION FOR A WRIT OF CERTIORARI

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March 17, 1982

QUESTIONS PRESENTED

1. Whether a state property tax on bank shares computed on a bank's net assets without any deduction for tax-exempt United States obligations owned by the bank violates 31 U.S.C. § 742?

2. Whether a state tax on bank shares computed on a bank's net assets with a deduction for the bank's real estate, but without any deduction for its tax-exempt United States obligations, discriminates against those obligations in violation of the Borrowing Clause of the Constitution?

LISTING OF PARTIES

Petitioners

All of the following petitioner banking corporations or national banking associations are located in Dallas County, Texas, except for Canyon Creek National Bank which is located in Collin County, Texas. The names in parentheses are the current names of banks which have changed the name under which they do business since commencement of the actions herein.

American Bank and Trust Company (InterFirst Bank – Oak Cliff)
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Company
Citizens National Bank of Dallas (Cullen/Frost Bank of Dallas, N.A.)
Dallas International Bank
Dallas National Bank (RepublicBank Dallas East, N.A.)
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank (Allied Bank – Southwest)
First National Bank in Dallas (InterFirst Bank Dallas, N.A.)
First National Bank in Garland (RepublicBank Garland, N.A.)
First National Bank of Lancaster
First Security Bank of Dallas, N.A. (First City Bank – Market Center, N.A.)
First Security Bank of Garland, N.A. (First City Bank of Garland, N.A.)
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank
Greenville Avenue Bank and Trust (RepublicBank Greenville Avenue)
Grove State Bank (InterFirst Bank Pleasant Grove)
Inwood National Bank of Dallas
Lakewood Bank and Trust Company (Allied Lakewood Bank)
Love Field National Bank
Mercantile National Bank at Dallas

Metro Bank of Dallas
(Allied Bank of Dallas)
National Bank of Commerce
of Dallas
North Dallas Bank & Trust Co.
NorthPark National Bank
of Dallas
Oak Cliff Bank and Trust
Company
(RepublicBank Oak Cliff)
Pan American National Bank
of Dallas
Park Cities Bank
(InterFirst Bank Park Cities)
Preston State Bank
Prestonwood National Bank
Republic National Bank
of Dallas
(RepublicBank Dallas, N.A.)
Reunion Bank
Texas American Bank,
Dallas North
Texas Commerce Bank –
Campbell Centre, N.A.
Texas Commerce Bank –
Casa Linda, N.A.
Texas Commerce Bank –
Dallas
Texas Commerce Bank –
Garland
Texas Commerce Bank –
Northwest, N.A.
Texas Commerce Bank –
Park Central, N.A.
Texas Commerce Bank –
Preston Royal
Trinity National Bank of
Dallas
Valley View Bank
(First City Bank –
Valley View)
White Rock Bank of Dallas
Wynnewood Bank & Trust

The following class representatives are petitioners on behalf of the petitioner class of all shareholders of all of the above listed petitioner banks as of January 1, 1980:

Richard M. Hart
Frank Marshall
Ronald G. Steinhart
Peyton Cooper
Charles N. Brewer
Lynn D. Turner
A. A. Walker
Woodrow Brownlee

The following petitioners are the shareholders of Bank of Texas or Wynnewood Bank & Trust as of January 1, 1979:

Horace Ainsworth
Carol Sanger
Alexander
Howard A.
Alexander
Rebecca Alexander
Thomas H.
Alexander

Thomas W. and Janice B. Alexander
Peggy J. Allen
Brandon Andreason
Keri E. Andreason
Richard D. Andreason
Tara M. Andreason
Ann Dalton Foundation
W. T. and Thelma Olive Anthony
Mike Aranson
Mr. and Mrs. Angelo Athas
George T. Aubin
Austin National Bank
John and Mary Baker
Lee S. Bane
William D. Barrett
Martin Balk
Dean M. Baucum
Imogene Bennett
A. H. Bickle
James E. Biggs
Jeffery Ray Bishop
Charles C. Blaylock
Lloyd D. Blaylock
Louis Blaylock, Jr.
Lee Blocker
James T. Boggs
Hester Lynn Bond
John Russell Bond, Jr.
Norman A. Boyd, Jr.
Bracewell & Patterson & Co.
Brooks Bradford
Thelma Balcom Bradley
Buell D. Braswell
Rosalie V. Braswell
Una Williams Brazelton
David G. Brewer, II
Sandra L. Brewer
L. D. Brinkman
E. B. Brooks, Jr.
Alton Watson Bryant
Barbara Mae Bryant
Maggie Burnett
Scott Campbell
Ross Cangelose
Sam T. Cangelose
Pat Carbone
Peggy Carpenter
R. D. Carpenter
Elizabeth Sue Cash
Peter S. Chantilis
M. D. Chapman
Charter Investment Co.
Jack Chewning, Sr.
J.E.R. Chilton, III
Carter B. Christie
Charles S. Christopher
Frederica Cobb
James L. Cody
Hardie C. Cole
Communities Foundation of Texas, Inc.
David P. Copeland, Jr.
Albert R. Cox
Maurine P. Craft
Rhea F. Crane
Avis Davis
Dr. William B. Dean
Granville M. Deane, Jr.
Dorothy J. DeFord
Homer H. DeFord
Louis A. DeHaes
James H. Depenbrock
Barbara Sue Woolf Devereux
Julien Devereux
James F. Dewey
George F. Dillman
Leemond P. Dodd
Louise Dodd
Dennis J. Dolan
Thomas E. Dolan
Patricia G. Dolan
Joan M. Dolan
Marguerite A. Domatti
Stanley J. Donnell
John H. Eix
Raymond I. Emery
Elnora Evans
Thomas A. Ewers
Allen Maurice Fain
Lourene Fain
Carlene Farley
Frances M. Farr
Mayme Lou Ferguson
Firbeau Company

First City Bank
Henry A. Forster
Montez W. Forster
Helen H. Forteith
Frances C. Foster, Executor of The Estate of Nolan N. Foster
Mattie R. Fouts
Roy W. Fouts
Glenn A. Foy, Jr.
Mary Ellen Hardy Foy
J. T. Freeland
Odessa Freeman
David M. Gallaway
R. M. Ginsberg,
Mary J. B. Glenn
Elwood J. Goodier, Jr.
Harry M. Graham
Mark A. Graham
Warren L. Gravely, Jr.
Claude Graves, Jr.
Willis A. Grayson
Charlsye Green, Executor of the Estate of W. D. Green
Monard Gregg
Elizabeth Griffis
Truman Griggs
James C. Hadsell
William H. Haley, Jr.
Bethany Jo Hall
J. B. Haralson
Jeffrey Kurt Haralson
Dr. Calvin W. Harris
Marcielle Harris
James M. Hatler
William B. Henley, Jr.
Mary S. Hiegel
Al Hill, Jr.
Frank A. Hoke
Asa Holleman
Billie Frances Holleman
J. Frank Holt
Rosa Lee Hull
E. F. Hutton & Co., Inc.
Ivan Irwin, Jr.
Ruby M. Johnston
Dixie Shelley Jones
John J. Joyce
Dr. E. J. Justema
Milton C. Justice
Kidder Peabody & Company, Inc.
John Muir Kipp
William Marble Kipp
Jon Kirk
Donald H. Kitzrow
David H. Kitzrow
Troy K. Kitzrow
Ed J. Kunecki
Harry P. Kunecki
Eva Kathryn LaCoke
Frank LaCoke
Julio S. Laguarta
Traylor Lander
Frederick M. Lange
Jean C. Latimer
L. J. Lee
Naomi Lee
George Lenox
Robert S. Lipson
Joseph F. Lollman
William F. Lynch
Joe W. Maddox
Donald J. Malouf
Eura Mason
J. D. Mason
Opal McAdams
Pat McDowell
Julian M. Meer
Sarah Ann Meredith
Charles (Bo) Miller
Gregory Milliorn
Kemberly Milliorn
Michael Raymond Milliorn
Dovie Milner
Roy L. Milner
Vera Morrison
L. Craig Morton
William C. Murphy
Eloise R. Myers
Jan Jager Newberry
Charles Brandon Newman
James E. Norwood
Evelyn Clay Marcus O'Hara
N. D. Oswald
Bette Parnell

Kyle Parnell
Thelma Peters
Albert C. Phillips
Daphne M. Phillips
Harvey M. Phillips
Jewel Phillips
K. W. Pickering
R. O. Pietzsch
John Pillow
Cyril J. Pokladnik
Joseph E. Pokladnik
Mrs. H. M. Poston
Joyce Race
Robert G. Race
James C. Raddatz
Harry V. Rankin
Rauscher Pierce Refsnes, Inc.
Ras Redwine
Jack Rich
Fred Rizk
William J. Rochelle, Jr., Trustee in Bankruptcy for Angus G. Wynne, Jr.
James R. Rodgers
John C. Rogers
William R. Rutherford
Dr. John Ryan
Jack B. Ryan
S.N.S. Co.
Dorothy Salisbury
Perry S. Salisbury
Bert Sanger, Jr.
Mary Julia Sanger
Keith Tristan Sanger
Dr. P. W. Schneider
Stanley J. Scott
J. M. Severson
Mary Ward Sheldon
James W. Simmons
Don S. Simpson
Charles M. Sloan
Addalee Ann Smith
F. Gilbert Smith
J. T. Smith
Mr. and Mrs. Ray F. Smith
Anthonette M. Smith
Troy R. Smith, Jr.
Mary Snow
F. J. Spillman
John O. Spring
H. D. Stanley
Arlene Marie Sterling
Mr. and Mrs. J. W. Sterling
Mary Jean Sterling
Thomas H. Sterling
Rosa Lee Stinett
Raymond D. Sudduth
Tommie M. Sudduth
Allena Taylor
Vernon O. Teofan
Texas Commerce Bank – Austin
Texbank & Co.
Ann Victoria Thomas
Callie Thompson
Craft Thompson
Craft Thompson, II
Mrs. Craft Thompson
A. Modine Thompson
John E. Thompson
Tony Todora
Dr. R. G. Tromly
Raymond P. and Minnie Pearl Truelove
Charles Underwood, Jr.
Phillip Vaccaro
Garner F. Vollmer
John S. Walker
Jeanette P. Wallace
Robert E. Wallace
Richard L. Walton
E. John Ward
Louis A. Watson
Nathan A. Watson
John Wayne
Milton M. Weinberger
William M. Weiss
Tim West
Carl Westcott
John W. Williams, Jr.
Brooksie Jeanne Willie
Raymond Willie, Jr.
Edward A. Wolff
Willie H. Wolff
William M. Womack
Mr. and Mrs. C. Wayne Woodring
Lloyd C. Woody

Agnes C. Woody
Jack I. Woolf
Orien L. Woolf
J. C. Wright
Lois Wright
R. C. Wynn
Raymond G. Zauber

The following entities are parent companies, non-wholly owned subsidiaries, or affiliates of one or more of the petitioner corporations:

Allied Bancshares, Inc.
Austin Bankshares, Inc.
Brookhollow Bancshares, Inc.
Commerce Southwest, Inc.
Continental Bancshares, Inc.
Cullen/Frost Bankers, Inc.
Dallas Bancshares
First City Bancorporation of Texas, Inc.
GAB Co.
InterFirst Corporation
InterFirst Services Corp.
International Energy Bank
Inter-Regional Financial Group, Inc.
Inverfin, S.A.
Inwood Bancshares, Inc.
Mercantile Texas Corporation
Mercantile Dallas Corporation
NorthPark National Corporation
Republic of Texas Corporation
Pine Island Corporation
Prairie Canal Company
Reunion Bancshares, Inc.
Southwest Bancshares, Inc.
Texas American Bancshares, Inc.
Texas Commerce Bancshares, Inc.
United Petroleum Company
WHC Corp.
Wynnewood Bancshares, Inc.

Respondents

The following county, town, cities, and independent school districts, all of which are subdivisions of the state of Texas, are respondents on this petition:

Dallas County
City of Dallas
Dallas Independent School District
City of Garland
Garland Independent School District
Town of Highland Park
Highland Park Independent School District
City of Richardson
Richardson Independent School District

The following tax assessor-collectors for the above state subdivisions are respondents on this petition:

John Childs
Max Noller
Tom Landrum
J. W. Wall
Larry Devers
N. G. Johnson
Joy Mongomery
Ernest Richardson

The following Boards of Equalization and those boards' members are respondents on this petition:

Board of Equalization of Dallas County, and its members Gary A. Weber, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr.

Board of Equalization of the City of Dallas and the Dallas Independent School District, and its members Port E. Stages, Jr., A. C. Moser, Jr., Dorothy Ramsey, and Jim S. Lake.

Board of Equalization for Richardson Independent School District, and its members R. H. Thompson, Nelson McCord, and Morris James.

Board of Equalization for Town of Highland Park and its members Frank R. Garrott, John Taylor, and George Nicaud.

Board of Equalization for the Highland Park Independent School District and its members Dr. Wendell A. Jones, Robert F. Titus, Morris E. Yarbrough, Jr.

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IN THE

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AMERICAN BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas[1] in *American Bank and Trust Company, et al. v. Dallas County, et al.* (No. 20915); *Bank of Texas, et al. v. Childs, et al.* (No. 20660); and *Wynnewood Bank & Trust, et al. v. Childs, et al.* (No. 20659).[2]

OPINIONS BELOW

The original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Appendix p. 44a. The first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at Appendix p. 6a. The second

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[1] After the decisions below, the name of the court below was changed from the "Court of *Civil* Appeals" to the "Court of Appeals". TEX CONST. art. V, § 6.

[2] The causes in the court below are referred to in this petition by their cause number in that court.

opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at Appendix p. 30a.

The summary opinions of the court below in Cause Nos. 20915 and 20659, relying exclusively on the opinions in Cause No. 20660, were not reported and are reproduced at Appendix pp. 1a and 40a.

JURISDICTION

The judgments of the court below were entered in Cause Nos. 20660 and 20659 on January 23, 1981, and timely motions for rehearing in those cases were denied on May 1, 1981. The judgment of the court below was entered in Cause No. 20915 on June 3, 1981, and a timely motion for rehearing was denied on July 1, 1981.

Petitioners made timely applications for writs of error to the Supreme Court of Texas, which declined to review the judgments below by denying writs of error in all three cases on January 6, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. I, § 8,cl. 2

> Section 8. The Congress shall have the Power . . . to borrow money on the credit of the United States. . . .

31 U.S.C. § 742

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would

require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.[3]

12 U.S.C. § 548

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960)[4]

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such un-

[3] The second sentence of 31 U.S.C. § 742 was added by Congress in 1959. Pub. L. No. 86-346, Title I, § 105, 73 Stat. 622 (1959).

[4] Effective January 1, 1982, Article 7166 was replaced by substantively similar provisions of the Texas Property Tax Code. Tex. Prop. Tax Code §§ 21.09, 22.06, 23.11, and 25.14 (Vernon Supp. 1981); Tex. Laws 1979, ch. 841, at 2329.

rendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

This petition seeks review of the judgments of the court below in three cases in which local property taxes imposed under state law are challenged as violating the immunity from state taxation enjoyed by United States obligations. The petitioners are the banks upon whose shares the taxes were assessed and those banks' shareholders, either individually (in Cause Nos. 20660 and 20659), or as a class (in Cause No. 20915). The respondents are the local taxing districts and authorities who assessed and levied the challenged taxes. The questions presented in this petition are identical in all three causes.

The banks' shares were taxed under the provisions of Article 7166 of the Texas Revised Civil Statutes. The respondents assessed the banks' total outstanding shares by applying the appropriate tax rate to each bank's assets — including United States obligations — less each bank's liabilities and the assessed value of its real estate.

See opinion below at Appendix p. 15a; 615 S.W.2d at 816. SF[5] (in No. 20915) 116, 181-183, 210, 235-238, 293, 295, 325-326, 358, 364; SF (in No. 20660) 226-228; Tr (in No. 20659) 38-39. The real estate was deducted to prevent double taxation since real estate is separately taxed to the banks. SF (in No. 20915) 117. *Accord City of Midland v. Midland National Bank,* 607 S.W.2d 303, 304 (Tex. Civ. App. — El Paso 1980, *writ ref'd n.r.e.).*

In measuring the tax by assets (other than real estate) less liabilities, the respondent taxing authorities refused to make or permit any deduction for United States obligations held as assets by the banks. See opinion below at Appendix pp. 15a-16a; 615 S.W.2d at 816-17. Tr (in No. 20915) 143-155; SF (in No. 20660) 175-177, 227-228; Tr (in No. 20659) 38-39. Thus the United States obligations owned by each bank were included in calculating its net assets for the purpose of computing the bank share tax.

Petitioners in the trial court sought injunctive and declaratory relief against the tax on the ground that respondents violated federal law in computing the tax without a deduction for the banks' United States obligations. Tr (in No. 20915) pp. 37-49; Tr (in No. 20660) pp. 18-31; Tr (in No. 20659) pp. 85-91. The court below considered, discussed, and denied this claim of petitioners.[6] See opinion below at

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[5] "SF" refers to the Statement of Facts, the state designation for the transcript of proceedings; "TR" refers to the Transcript, the state designation for the court papers on file. Together these documents constitute the appellate record in Texas.

[6] The court below originally held that the tax violated 31 U.S.C. § 742, based on *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978). On respondents' motion for rehearing, however, the court below withdrew its opinion and held the Montana decision was incorrect. See pp. 7-8, below.

Appendix pp. 27a-29a; 615 S.W.2d at 822-823. Petitioners made this federal claim the basis for timely applications to the Supreme Court of Texas for writs of error to review the judgments of the court below. On January 6, 1982, the Supreme Court of Texas declined to exercise its discretionary jurisdiction to review the judgments of the court below. See Appendix pp. 4a, 39a, and 43a.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to resolve the Questions Presented which concern the immunity of United States obligations from local taxation under a federal statute and under the Constitution.

The decision below is in direct conflict with the decision of the Supreme Court of Montana in *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978) as to the immunity from taxation of United States obligations under 31 U.S.C. § 742. It is incorrect on that issue. Whether the failure to deduct United States obligations in computing this bank share tax violates § 742 is a substantial and important federal question which has not been, but which should be, settled by this Court.

Finally, the decision below is contrary to the decision of this Court in *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935), which held that a share tax similar to this tax discriminates against United States obligations in violation of the Borrowing Clause of the Constitution.

There is a Conflict Among the States

The 1959 amendment to 31 U.S.C. § 742 forbids any state or local tax which requires "that either the [United States] obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax . . . ."

31 U.S.C. § 742. This Court has never had an opportunity to rule on whether this prohibition is violated by a bank share tax computed on a bank's net assets without a deduction for United States obligations. In *Montana Bankers Association v. Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978), the Supreme Court of Montana held that the amendment to § 742 requires that such a deduction be made because without the deduction the immunity enjoyed by United States obligations under § 742 would be violated by the tax. *Accord First Security Bank v. Montana Department of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978). No review of the Montana decisions was sought in this Court.

On the identical question of federal law, the court below originally followed the *Montana Bankers Association* decision and held that the 1959 amendment to § 742 requires the deduction of a bank's United States obligations when computing a bank share tax measured by net assets. See withdrawn opinion below, Appendix pp. 48a-51a. On rehearing, however, the court below held, without briefs or argument, that the Montana decision was in error on this federal question, stating:

> Although we originally reached the same conclusion as the Montana court, further examination of [31 U.S.C. § 742] in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, 'Except as otherwise provided by law,' and also ignores another statute, section 5219 of the Revised Statutes of the United States [12 U.S.C. § 548] [Footnote omitted], which falls within this exception.

Appendix p. 16a; 615 S.W.2d at 817, *Accord* Appendix pp. 29a-30a; 615 S.W.2d at 823 (Robertson, J., concurring).

The tax involved in the *Montana Bankers Association* case is indistinguishable from the tax involved here. Each

is a bank share tax computed by determining the net assets of the bank, and in each case the taxing authorities refused to make any deduction in that determination for the banks' United States obligations. The Montana Supreme Court held that the 1959 amendment to 31 U.S.C. § 742 requires the deduction of those obligations; the Texas court of appeals held it does not. The conflict is explicit and direct.

The Court should grant a writ of certiorari to resolve this conflict.

The Question is Substantial

This Court has not had an opportunity to review the effect of the 1959 amendment to 31 U.S.C. § 742 on bank share taxes. This question is an important one on which this Court should rule. Montana, Texas and Georgia have already reached conflicting results on whether the amendment to § 742 requires the deduction of United States obligations in computing a bank share tax like the tax involved here.[7] The conflicts and resulting confusion will be compounded since six other states have bank share taxes computed as the tax here was computed.[8] Without a resolution of this issue by this Court, the states alone will have to determine the impact of amended § 742, and those determinations will be made without the guidance of any

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[7] On January 6, 1982, the Supreme Court of Georgia rejected the holding of the Montana Supreme Court and held that no deduction for United States obligations was required in computing the Georgia bank share tax. *Bartow County Bank v. Bartow County Board of Tax Assessors*, No. 37868 (Ga., January 6, 1982).

[8] GA. CODE ANN. § 91A-3301 (1980); LA. REV. STAT. ANN. 26 § 1967 (West Supp. 1982); NEV. REV. STAT. § 367.020-030 (1979); OHIO REV. CODE (Page) § 5725.04 (1980); PA. CONS. STAT. 72 § 7701 (Purdon Supp. 1982); W. VA. CODE § 11-3-14 (1974).

federal court since the United States District Courts are effectively precluded from addressing this federal question. 28 U.S.C. § 1341. *See generally Rosewell v. LaSalle National Bank,* 450 U.S. 503 (1981).

A classic function of this Court is to provide guidance when the states disagree among themselves on important federal questions. Precisely such a disagreement exists here. The record is appropriate for deciding the broad and important federal issue involved, uncluttered by extraneous factual disputes or by peculiarities of state law. A ruling from this Court in this case would be dispositive in the states which have similar taxes, and will thus provide those states with authoritative interpretation of the 1959 amendment to 31 U.S.C. § 742.

While a resolution of this federal question is of substantial importance to the states and to the taxpayers of those states, it is also important to the federal government. United States obligations are immune from state taxation because the "power to tax involves the power to destroy." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819). This immunity prevents states from interfering with the federal government's power to borrow money to operate the government. *Weston v. City Council of Charleston,* 27 U.S. (2 Pet.) 449 (1829); U.S. CONST. art. I, § 8, cl. 2; U.S. CONST. art. VI, cl. 2; 31 U.S.C. § 742. It is designed "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U.S. 665, 675 (1950) quoting *Smith v. Davis,* 323 U.S. 111, 117 (1944).

If, as petitioners contend, United States obligations cannot be considered in the computation of this tax, respon-

dents have unlawfully burdened the power of the United States to borrow money. Such a result is menacing to the borrowing needs of the federal government because banks have traditionally been large holders of United States obligations. In 1980 banks nationwide held approximately 116 billion dollars in United States Treasury obligations alone; on December 31, 1980, at a time when the withdrawn opinion of the court below was still in effect, Texas banks held 7.2 billion dollars of United States Treasury obligations.[9] FEDERAL RESERVE BULLETIN, p. A-32 (January 1982) TEXAS ALMANAC (1982-1983), p. 391 (Source: Federal Reserve Bank of Dallas). A tax which unlawfully considers United States obligations impinges on banks (by reducing the yield of their obligations) or their shareholders (by reducing the yield of their stock), and thus discourages banks from purchasing United States obligations. This in turn makes competing investments more attractive to banks and thereby unlawfully hinders the federal government's ability to borrow money.

The timely resolution of this issue is as vital to the United States government and the national economy as it is to the banking community and the state taxing authorities. The question presented is an important one on which this Court should rule.

The Decision Below is Incorrect

Petitioners contend that a state share tax computed on net assets without a deduction for United States obligations necessarily violates the 1959 amendment to 31 U.S.C. § 742. Section 742 was amended in 1959 to provide that the im-

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[9] These figures do not include obligations of tax-exempt United States agencies other than the Treasury.

munity of United States obligations from state or local taxation

> extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . . [31 U.S.C. § 742; Pub. L. 86-346, Title I, § 105, 73 Stat. 622 (1959)]

A tax measured by net assets "considers" the assets of the bank. *See, e.g., Des Moines National Bank v. Fairweather*, 263 U.S. 103, 111 (1923); *City of Midland v. Midland National Bank*, 607 S.W.2d 303 (Tex. Civ. App. — El Paso 1980, *writ ref'd n.r.e.*); TEX. ATT'Y GEN. OP. No. M-1028 (1971); TEX ATT'Y GEN. OP. No. 0-4675 (1942). Because the banks' assets include United States obligations, the computation of the tax *considers* those obligations and thus violates amended § 742.

Prior to the 1959 amendment to § 742, a bank share tax could consider a bank's United States obligations so long as the burden of the tax was upon the shares rather than the assets of the bank.[10] *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923). But the distinction between a tax on shares and one on corporate assets only has significance in the context in which it was announced and applied — that is, a context of a federal prohibition against state taxes *upon* United States obligations. The

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[10] This theory has been the subject of criticism by members of this Court since its inception. *Van Allen v. Assessors*, 70 U.S. (3 Wall.) 573, 588 (1866) (Chase, C. J., concurring). More recently, and just before the 1959 amendment to 31 U.S.C. § 742, this Court recognized that a share tax measured by net assets is "difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations is concerned." *Society for Savings v. Bowers*, 349 U.S. 143, 148 (1955).

1959 amendment to 31 U.S.C. § 742, however, goes beyond proscribing taxes *upon* United States obligations, and prohibits taxes which *consider* those obligations, directly or indirectly, in the *computation* of a local tax. In the 1959 amendment Congress extended the exemption to prohibit exactly what had been permitted under the former exemption.

In light of the expanded prohibition provided by the 1959 amendment to § 742, the distinction between a tax upon shares and a tax upon the corporations' assets is no longer relevant to the issue of whether United States obligations have to be deducted when they would otherwise be considered in the computation of a particular tax. Because a bank share tax measured by assets less liabilities *considers* the banks' assets, it necessarily violates 31 U.S.C. § 742 unless a deduction is made for the banks' United States obligations. *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978); *First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913 (1978).

This case does not involve nuances of choice between alternative interpretations of an ambiguous statute. The command of § 742 is plain. The court below simply wrangled the federal statute out of existence in order to save this local tax.

The court below took for granted that the tax "considers" the banks' United States obligations; indeed, in its withdrawn opinion it had held the obligations were so considered. See withdrawn opinion below, Appendix pp. 49a-50a. But on rehearing the court found the Montana decision was "unsound" on the ground that it did not

take sufficient account of 12 U.S.C. § 548. The lower court's theory was that the predecessor statutes to § 548[11] had been held by this Court in *Van Allen v. Assessors,* 70 U.S. (3 Wall.) 573 (1866) to be Congressional "consent" to tax the shares of national banks without a deduction for bank-owned United States obligations. See opinion below, Appendix pp. 16a-17a; 615 S.W.2d at 817.

Earlier forms of § 548 consented to the limited taxation of national bank shares — which absent statutory authority would be immune from state taxation[12] — while § 548 now provides that national banks are to be taxed as state banks are taxed. The court below reasoned that because a predecessor statute of § 548 consented to the taxation of bank-owned United States obligations, and § 548 is "broader" than the former statute, § 548 therefore somehow consents to the taxation of bank-owned United States obligations. The court's theory is untenable for two reasons.

First, the court below misread the *Van Allen* decision. The lower court confused the existence of Congressional consent to tax national banks' shares with some perceived blanket consent to tax the value of shares calculated by considering the bank's United States obligations. The *Van Allen* decision held only that a tax upon shares was not a prohibited tax *upon* the bank's United States obligations. *See Des Moines National Bank v. Fairweather,* 263 U.S. 103, 112 (1923); *Home Savings Bank v. Des Moines,* 205 U.S. 503, 517-18 (1907); *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902). The only "consent" involved in the *Van Allen* decision arose because a national bank's shares were involved, and without Congressional

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[11] The pre-1969 versions of 12 U.S.C. § 548 (§ 5219 of the Revised Statutes of the United States) are reproduced at Appendix pp. 53a-57a and listed under the years in which they were enacted.

[12] *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931).

consent the tax would otherwise have been an unlawful imposition upon a federal instrumentality.

Second, the lower court's interpretation of § 548 is in no way supported by that statute. Section 548 provides only that national banks and state banks be treated alike for tax purposes. It does not consent to, or even concern, the consideration of United States obligations in computing a share tax. Not only is the lower court's interpretation of § 548 completely unrelated to the language of that statute, it ascribes to Congress an astonishing intent — that the proscriptions of § 742 apply to all business entities except banks, state or national.

Petitioners also contend that under the statutory scheme and the manner in which the tax was levied, the tax is in reality one upon the exempt obligations of the banks and thus violates 31 U.S.C. § 742, regardless of the impact of the 1959 amendment. *Society for Savings v. Bowers,* 349 U.S. 143 (1955); *Home Savings Bank v. Des Moines,* 205 U.S. 503 (1907).

Finally, petitioners contend that the tax violates the Borrowing Clause of the Constitution because it discriminates against United States obligations. U.S. Const. art. I, § 8, cl. 2. This discrimination occurs when the amount of the tax varies with the nature of assets involved. *See Werner Machine Co. v. Director of Division of Taxation,* 350 U.S. 492, 493-94 (1956). The share tax assessed by respondents varies exclusively with the nature of the banks' assets. An increase in the amount of United States obligations rather than real estate increases the share tax; an increase in the amount of real estate rather than United States obligations lowers the share tax.[13] Thus the share tax burden increases

[13] Purchasing any real estate will lower the share tax, and purchasing real estate in a taxing district with a lower tax rate will reduce the total amount paid for real estate and share taxes. *See* Tex. Att'y Gen. Op. No. 0-1214 (1939).

with the amount of United States obligations owned in place of real estate.

In *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113, 120 (1935), this Court held that, with respect to a share tax measured by only part of the net assets, "if to exclude securities *already taxed* . . . avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership" (emphasis added). As a result, the tax in the *Schuylkill Trust Co.* decision was held to violate the Borrowing Clause of the Constitution. *Accord Anderson v. Herrington,* 169 Neb. 391, 99 N.W.2d 621 (1959); *Peter Kiewit Sons' Co. v. Douglas County,* 161 Neb. 93, 72 N.W.2d 415 (1955).

The bank share tax assessed by respondents discriminates against United States obligations in precisely the same way the tax in the *Schuylkill Trust Co.* decision discriminated against those obligations. Respondents deducted real estate from net assets because it is otherwise taxed, while no deduction was permitted for United States obligations. Thus, as in the *Schuylkill Trust Co.* case, the tax assessed by respondents discriminates against United States obligations.

The court below attempted to distinguish the *Schuylkill Trust Co.* case on the asserted ground that it was limited to share taxes providing for a deduction of tax *exempt* property other than United States obligations. Appendix pp. 28a-29a; 615 S.W.2d at 822-23. The *Schuylkill Trust Co.* decision, however, was not so limited; the prohibition in that case extends to share taxes computed with a deduction of any property, taxable *or* exempt, but without a deduction for United States obligations. *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113, 120 (1935).

The decision below thwarts the immunity from local taxation afforded by 31 U.S.C. § 742, and refuses to recognize the decisions of this Court which prohibit local taxes that discriminate against United States obligations. The lower court's refusal to acknowledge applicable federal law is so erroneous as to call for correction by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 17, 1982

Appendix

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,

Appellants,

v.

DALLAS COUNTY, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
June 3, 1981

OPINION

After examining the briefs and hearing oral argument in this case and reviewing the authorities cited, we have determined that all matters raised by appellants were fully considered in Bank of Texas v. Dallas County, 615 S.W.2d 810 (Tex. Civ. App. — Dallas, No. 20660, January 23, 1981, motion for rehearing overruled, April 30, 1981). For the reasons stated in our opinions in that case, the judgment of the trial court in the present case is affirmed.

CLARENCE A. GUITTARD
Chief Justice

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,
Appellants,

v.

DALLAS COUNTY, et al.,
Appellees.

Wednesday, June 3, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees Dallas County, et al, have and recover of and from the appellants, American Bank and Trust, et al and from the check deposit in the hands of the District Clerk of Dallas County, Texas made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,

Appellants,

v.

DALLAS COUNTY, et al.,

Appellees.

Wednesday, July 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-589, AMERICAN BANK & TRUST ET AL, v. DALLAS COUNTY ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Friday, January 23, 1981

ORDER GRANTING APPELLEES' MOTION FOR REHEARING

This day came on to be heard appellants' and appellees' motion for rehearing in the above cause, and the same being inspected, it is considered, adjudged and ordered that appellants' motion be overruled, and that appellees' motion be granted; and that the former judgment of this court rendered on November 7, 1980 be set aside and the following substituted therefor, to-wit:

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
Concurring Opinion by Justice Robertson
January 23, 1981

OPINION
ON MOTIONS FOR REHEARING

The principal question in this case is the validity of the tax on bank shares assessed by Dallas County under article 7150.6 and 7166 of the Texas Revised Civil Statutes.[1] The suit was brought by the Bank of Texas, a state banking corporation, and all its shareholders, against the county, its tax assessor-collector, and board of equalization, for mandamus, injunction, and declaratory relief, alleging that the county's tax plan of 1979 is illegal under state law, or if not illegal, unlawfully discriminates against holders of bank shares because no such tax is assessed against other intangible property including other moneyed capital in the hands of individuals. The bank and its shareholders further contend that the assessment is illegal under fed-

[1] These articles were repealed by Section 6(a)(1) of the Property Tax Code, effective January 1, 1982. TEX. LAWS 1979, ch. 841, at 2329.

eral law because it considers the value of obligations of the United States held by the bank in computing the tax, contrary to the federal statute exempting such obligations from taxation.

After a trial without a jury, the trial court upheld the tax and denied the relief sought. We affirm.

State Law

We consider first the contention that the county has no authority to tax shares of bank stock because article 7150.6, which exempts most intangible property from taxation, has the effect of repealing the tax on bank shares imposed by article 7166. Since article 7166 is not expressly repealed, we must examine the two statutes to determine whether the legislature intended to impliedly repeal the tax on bank shares. We conclude that no such repeal was intended by the legislature.

Article 7166 is as follows:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered

property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960).

The pertinent provisions of article 7150.6 are as follows:

(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.

(b) Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166, or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes) .... TEX. REV. CIV. STAT. ANN. art. 7150.6 (Vernon Supp. 1980).

The bank and its shareholders contend that since article 7166 provides that bank shares may not be taxed at a greater rate than other moneyed capital in the hands of individuals, and article 7150.6 expressly exempts such other moneyed capital from taxation, 7166 no longer imposes a tax on bank shares. They acknowledged in oral argument that this contention means that article 7166 has been repealed by implication.

We do not agree that article 7166 was repealed by article 7150.6. Since repeals by implication are not favored, old and new statutes that are not positively repugnant will each be construed so as to give effect to both, if possible. *Standard v. Sadler,* 383 S.W.2d 391, 395 (Tex. 1964). We have no difficulty in construing these two statutes so as to give effect to both. In fact, article 7166 falls within an express exception to the exemption of intangible property from taxation provided by article 7150.6(a). It would be clearly contrary to the legislative intent to hold that an earlier statute expressly specified in an exception to the later statute is repealed by the later statute.

The only provision of article 7166 that is arguably repealed by article 7150.6 is the last sentence of article 7166, which provides:

> Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against all other moneyed capital in the hands of individuals.

If the intent of article 7150.6 is to repeal all taxes on "other moneyed capital in the hands of individuals" but to retain the tax on bank shares, as the reference to article 7166 in subsection (b) of article 7150.6 indicates, then the last sentence of article 7166 above quoted may no longer be effective. This interpretation is preferable to ascribing to the legislature the intent to repeal article 7166 in its entirety because of the express exclusion of the bank shares tax in article 7150.6(b). Moreover, repeal of only the last sentence would be supported by the rule that when two statutes have conflicting provisions, the earlier statute will be held to be repealed only to the extent of the conflict, and otherwise will be construed as remaining in effect. *Whittenberg v. Craven,* 258 S.W. 152, 153 (Tex. Com. App.

1924, judgmt adopted); *Texas State Board of Pharmacy v. Kittman,* 550 S.W.2d 104, 107 (Tex. Civ. App. — Tyler 1977, no writ); *Parker v. State,* 208 S.W.2d 380, 383-84 (Tex. Civ. App.), *aff'd* 147 Tex. 57, 212 S.W.2d 132 (1948). Consequently, rather than construe article 7150.6 as repealing article 7166 in its entirety, we would be required to construe it as repealing only the last sentence.[2]

However, it may not be necessary to go so far as to hold that the last sentence of article 7166 has been repealed by article 7150.6. Subdivision (b) of article 7150.6 enumerates several statutes in addition to article 7166 that are excluded from the exemption of intangible property from taxation. We need not determine whether any of these other statutes impose a tax on "moneyed capital in the hands of individuals." There is no contention here that any of them does impose such a tax, but if any of them do, the last sentence of article 7166 may still be effective to forbid the taxation of bank shares at a greater rate than the tax imposed by any of those statutes. If none of them imposes such a tax, then the last sentence may have no effect until and unless legislation is enacted imposing such a tax.

Furthermore, we note that there is no evidence in the present record that there is, in Dallas County or elsewhere,

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[2]That construction would be reasonable in view of the fact that the provision forbidding taxing bank stock at a greater rate than "other moneyed capital in the hands of individuals," was apparently taken from section 5219 of the Revised Statutes of the United States, which authorized state taxation of shares of national banks, but not at a greater rate than "other moneyed capital in the hands of individual citizens of such State." Since the federal statute has now been amended to provide that a national bank shall be treated the same as a state bank for purposes of state taxation, 12 U.S.C. § 548 (1976), it is reasonable to suppose that the corresponding limitation in article 7166 is no longer necessary.

any "other moneyed capital in the hands of individuals" that is exempt from taxation under article 7150.6. Consequently, there is no evidence the tax plan of Dallas County is illegal on the ground that the bank shares in question are taxed at a greater rate than "other moneyed capital in the hands of individuals."

For the reasons stated, we hold that when article 7150.6 and article 7166 are read together, and effect is given to both to the extent possible, a tax is still imposed on bank shares. Our holding in this respect is not contrary to *Childs v. Reunion Bank,* 587 S.W.2d 466, 470 (Tex. Civ. App.— Dallas 1979, writ ref'd n.r.e.). That case concerned taxes assessed before the exemption provided by article 7150.6 became effective, and this court held that since the record showed that numerous classes of taxable property, including other moneyed capital in the hands of individuals, were subject to taxation, but were not included in the tax rolls, the assessment on bank shares was in violation of article 7166. That holding cannot control this case because of the provisions of article 7150.6, which, as already explained, by its express reference to article 7166, excludes bank shares from the exemption of intangible property, and, consequently, would have the effect of repealing only the last sentence of article 7166, if that sentence would otherwise extend the exemption to bank shares.

Inequality of Taxation

The bank and its stockholders contend further that if a tax is imposed on bank shares by articles 7150.6 and 7166, these statutes are unconstitutional because they deliberately omit taxation of shares of non-banking corporations and most intangible personal property, contrary to article VIII, section 1, of the Texas Constitution, which provides, "Taxation shall be equal and uniform." The county responds that under article VIII, section 1, as amended effective Janu-

ary 1, 1979, taxation of intangible property is permitted, but not required. We agree with the county's interpretation. Formerly, this section provided, "All property in this State . . . shall be taxed in proportion to its value . . . ." As amended, it provides, "All real property and tangible personal property in this State . . . shall be taxed in proportion to its value . . . ." The amendment adds further that the legislature "may provide for the taxation of intangible property." We interpret the amendment to mean that the legislature may tax intangible property or exempt it, or tax certain classes of intangible property and exempt others.

We recognize that section 1 as amended still provides, "Taxation shall be equal and uniform." With respect to intangible property, this requirement applies only to property which the legislature decides to tax, and permits reasonable classification for tax purposes, so long as the taxes are equal and uniform within each class. *See Hurt v. Cooper,* 130 Tex. 433, 110 S.W.2d 896, 900-01 (1937); *Grayson County State Bank v. Calvert,* 357 S.W.2d 160, 162 (Tex. Civ. App. — Austin 1962, writ ref'd n.r.e.).

The further contention is made, however, that articles 7150.6 and 7166 deny equal protection of the laws, and, therefore, also offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because no shares of other corporations are so taxed. This contention raises the question of reasonable classification. The authorities recognize that the states have a wide leeway in making classifications which, in their judgment, produce reasonable systems of taxation. *Kahn v. Shevin,* 416 U.S. 351, 355 (1974). Accordingly, a state tax law that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Id.* (tax exemption of widows not applying to widowers upheld).

We conclude that bank shares form a class of stock that, for tax purposes, may reasonably be distinguished from other intangible property, including other shares of stock. Banks enjoy powers and privileges not granted to other corporations. As the county points out, other corporations are subject to franchise taxes, which are not imposed on banks. Based on these differences, we cannot say that the legislature has singled out bank shares for arbitrary and unreasonable discrimination.

This conclusion is supported by *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181 (1933), in which it was contended that a tax on state banks denied equal protection because it was not also imposed on other corporations competing with banks. The court held:

> We cannot say that the state Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business, notwithstanding actual competition between them.
>
> Mere competition between them is not enough to show two concerns must be burdened alike. The state Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious, or wholly unreasonable. *Id.* at 185-86.

In the present case it is also suggested that no valid discrimination can rest on the difference between banks and other corporations without repudiating the distinction between a tax on bank assets and on bank shares. The county

relies on this distinction, established in *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866), to avoid application of the exemption of federal securities held by the bank in assessing the tax on the shares. The *Van Allen* rule will be discussed in the next section of this opinion. At this point we need observe only that we cannot accept the view that even though there may be valid grounds to distinguish between banks and other corporations, bank shareholders must be treated like all other shareholders for purposes of taxation. This is a question of equal protection rather than one of determining what property Congress has exempted from state taxation or has permitted the state to tax, such as that before the Supreme Court in *Van Allen*. If a state decides to give more favorable tax treatment to shareholders in corporations that pay franchise taxes than to shareholders in corporations that do not pay such taxes, such a classification cannot be regarded as arbitrary or unreasonable, and, therefore, the constitutional principle of equality is not offended. Consequently, we hold that the tax imposed on bank shares by articles 7150.6 and 7166 is valid and constitutional.

Exemption of Federal Securities

Another ground alleged as establishing invalidity of the county's plan for taxing bank shares is its failure to deduct the value of the federal securities held by the bank from the bank's net assets before apportioning their value pro rata in determining the value of the shares. Article 7166 provides that the real estate owned by the bank shall be separately rendered and assessed, and that all shares shall be rendered at their actual cash value, but that each share shall be assessed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed. No provision is made for a sim-

ilar deduction with respect to the federal securities held by the bank.

The evidence shows that the assessed value of the shares for 1979 was determined by book value rather than market value, that is, by subtracting the bank's liabilities from its total assets, deducting the assessed value of its real estate, and dividing that net figure by the number of shares to determine the taxable value per share. There is also evidence showing that if all obligations of the United States held by the bank were deducted from the value of the net assets, nothing would remain to be divided proportionately among the shareholders. The bank and its shareholders contend that this method of assessment is illegal under section 3701 of the Revised Statutes of the United States, 31 U.S.C. § 742 (1976), which provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The first sentence of this statute was enacted originally in 1862.[3] The second sentence was added by amendment in 1959.[4]

Before the amendment, state taxation of bank shares without allowing any deduction for federal securities was upheld by a well-established line of decisions by the Supreme Court of the United States, beginning with *Van*

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[3] Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 346.

[4] Pub. L. No. 86-346, § 105(a), 73 Stat. 622 (1959).

Allen v. The Assessors, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866). The bank and its shareholders insist that the 1959 amendment to section 3701 changed the rule established by those decisions because the amendment extended the exemption to "every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly in the computation of the tax," with exceptions not applicable to the present case. They rely on *Montana Bankers Ass'n v. Montana Department of Revenue, Mont.*, 580 P.2d 909 (1978), which held that the 1959 amendment is unambiguous and by its plain language precludes the assessment of a tax on bank shares that requires obligations of the United States to be considered directly or indirectly in the computation of the tax.

Although we originally reached the same conclusion as the Montana court, further examination of section 3701 in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, "Except as otherwise provided by law," and also ignores another statute, section 5219 of the Revised Statutes of the United States,[5] which falls within this exception. As we shall show

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[5]Section 5219 was originally included in the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, and was later codified as section 5219 of the revised statutes. It was also embodied in 12 U.S.C. § 548 (1964). It was amended in 1969 to provide simply that for the purpose of any federal or state tax law, a national bank "shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. § 548 (1976). We refer in this opinion to section 5219 as it existed in 1959, when section 3701 was amended, because our primary question turns on the meaning of section 3701. The 1969 amendment is evidently intended to broaden rather than restrict congressional consent to state taxation of national banks. *See* S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 1594.

in the discussion following, section 5219, upon which the *Van Allen* rule is based, expressly consents to local taxation of national banks, and, by implication, also consents to taxation of shares in state banks. It has been construed in *Van Allen* and the cases following it to extend this consent to the full interest of the shareholder in shares in both national and state banks, even though the tax is measured by the bank's capital without any deduction of federal securities held by the bank. When we read the exemption statute, section 3701 as amended in 1959, together with the consent statute, section 5219, it appears to us that Congress did not intend by the amendment to withdraw in any respect its consent to state taxation of national or state bank shares.

Consideration of this question must begin with the *Van Allen* opinion itself. The main question in that case was whether the state of New York had the power to tax the shares of national banks whose capital was wholly invested in obligations of the federal government. Counsel contended that the shares were exempt, citing the exemption statute (later codified as section 3701 of the Revised Statutes of the United States) and also the federal government's power to borrow money, as conferred by article I, section 8 of the Constitution of the United States. The opinion of the Supreme Court does not expressly refer to either the statute or to this provision of the Constitution, but evidently considered the question in the light of both. The Court does discuss at length and quotes from the consent statute a provision of the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, which then provided that the shares of national banks should be subject to taxation by state authority, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and providing further that such a tax "shall not exceed the rate imposed

upon the shares of any of the banks organized under the authority of the State." 70 U.S. (3 Wall.) at 581, 18 L.Ed. at 233.

The Supreme Court first considered the question of whether the tax was invalid because no similar tax was levied on the shares of state banks. The Court pointed out that the New York statute levied a tax on the capital of state banks, but since their capital might also be invested in federal securities, which were exempt from taxation, such a tax was not equivalent to a tax on the stockholders, such as that assessed against the stockholders of national banks. Consequently, the tax was held to be invalid under that section of the consent statute providing that taxes imposed on national banks should not exceed the rate imposed on the shares in state banks.

The Court went on to say, however, that since this defect might be remedied by the state legislature, (presumably by imposing a similar tax on shares in state banks), it would consider the main question of the power of the state to authorize the taxation of the shares of national banks whose capital was wholly invested in obligations of the federal government. In deciding this question, the Court again relied on the provisions of the National Bank Act and its express consent to state taxation of such shares, and held that such a tax was valid on the ground that the Congress, in authorizing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation. This appears to be the primary ground of the opinion. As an additional ground, the Court held that the tax on the shares was not a tax on the capital of the bank because of the shareholders' separate ownership of the shares. In discussing this ground, the Court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares, saying that although Con-

gress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act.

The *Van Allen* opinion bears directly on the question of whether the consent statute permits the state's taxing power to apply only to that portion of the shareholder's interest in the bank's capital that was not invested in obligations of the federal government. After a detailed analysis of the National Bank Act, the Court concluded that Congress had intended to make the entire interest of the shareholders subject to taxation, and observed that such a limitation on the meaning of the term "shares" would be "so grave and important a change in the use of the term that, if so intended, would not have been left to judicial construction." 70 U.S. (3 Wall.) at 588, 18 L.Ed. at 236.

The *Van Allen* decision has been repeatedly reaffirmed and regarded as "settled law" by the Supreme Court. *See, e.g., People v. Commissioners of Taxes,* 71 U.S. (4 Wall.) 244 (1867); *Des Moines Nat'l Bank v. Fairweather,* 263 U.S. 103, 112-114 (1923); *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). In *Bowers* the Court characterized section 3701 as a legislative expression of the constitutional principle of the exemption of federal securities from state and local taxation, derived from the power of the federal government to borrow money conferred by article I, section 8, of the Constitution of the United States, and from the Supremacy Clause, article VI, clause 2.

The *Van Allen* rule was extended to shares in state banks in *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902). In that case a trust company organized under the laws of Ohio argued that the state tax on its shares should be computed by deducting from its capital certain federal securities because of the exemption provided by section 3701 of the

Revised Statutes of the United States. The Supreme Court observed that this argument claimed a greater immunity for the shares in the trust company than section 5219 provided for shares in national banks. In response to the argument that the laws of Congress governing taxation of national bank shares were immaterial to the power of the state to tax state bank shares, the Court held:

> The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want of harmony. *Id.* at 115.

As we understand the *Lander* opinion, it holds that section 5219, which by its terms consents to state taxation of national bank shares, also extends to state bank shares, and that any contrary interpretation of the exemption statute, section 3701, would bring it into conflict with section 5219. This conclusion logically follows from the *Van Allen* holding that the New York state tax on national bank shares was invalid because it imposed no equivalent tax on state bank shares. Of course, no federal consent was required for state taxation of the shares of state banks, as distinguished from national banks, except to the extent that state bank shares would otherwise have been exempt under section 3701 because of federal securities held by the bank. Consequently, the only pertinency of section 5219 to the *Lander* case was its effect on the exemption otherwise provided by section 3701. In other words, the Court held that in order to avoid more favorable treatment of state banks that national banks, the consent provided by section 5219 for state taxation of national bank shares, regardless of federal securities held by the bank, must apply also to state taxation of state bank shares.

These decisions demonstrate that before the 1959 amendment to section 3701, the state's authority to impose taxes on the shares of both state and national banks, valued according to the bank's assets without deducting federal securities, rested on the congressional consent provided by section 5219 as well as on the distinction between ownership of bank shares and bank assets. Therefore, we must take into consideration the language and purpose of both section 3701 and section 5219 in assessing the validity of the argument that the amendment to section 3701 changed the *Van Allen* rule. *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974). When the two statutes are read together, we find no irreconcilable conflict between the two. There can be no conflict in view of the initial words of section 3701, "Except as otherwise provided by law," which remained in the statute as before the amendment. This express exception obviates any difficulty that might otherwise exist in reconciling the provisions of section 5219 with the 1959 amendment to section 3701. The consent provided by section 5219 is "otherwise provided by law," and, therefore, falls within the exception to the exemption.

The original exception in section 3701 is not repealed or modified by the 1959 amendment, although other exceptions, not "otherwise provided by law," were added. One of these exceptions applies to corporate franchise taxes. Before the amendment, the exemption had been held not to apply to a tax imposed on a corporate franchise for the privilege of doing business in corporate form, though the tax was based on corporate assets (or income) without deducting federal securities (or the interest therefrom). *Educational Films Corp. v. Ward,* 282 U.S. 379 (1931); *Home Ins. Co. v. New York,* 134 U.S. 594 (1890). There was some inconsistency in the decisions on this point, however. *See Macallen Co. v. Massachusetts,* 279 U.S. 620 (1929); Comment, *Share Tax, Franchise Tax and Federal Banks —*

The Schuylkill Trust Co. Case, 84 Pa. L. Rev. 758, 764-66 (1936). The 1959 amendment to section 3701 cleared up this inconsistency by providing a specific exception for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations." It also provided a specific exception for estate and inheritance taxes, which, by similar reasoning, are imposed on the privilege of succession rather than on the property passing. *See West v. Oklahoma Tax Commission,* 334 U.S. 717, 727 (1948); *Billings v. Illinois,* 188 U.S. 97 (1903); *Cahn v. Calvert,* 159 Tex. 385, 321 S.W.2d 869, 872 (1959). In neither case, however, had such an exception been established on the basis of another federal statute, as in the case of bank shares, and consequently, such taxes were not clearly embraced within the express exception provided by the original exemption statute. There was no need to add another specific exception for taxes on bank shares because that subject was "otherwise provided by law," within the original exception, which is clearly broad enough to cover such taxes with respect to national bank shares.

If the 1959 amendment does not withdraw congressional consent to the taxation of national bank shares in view of the express consent still provided by section 5219, neither can it reasonably be construed as negating the implication of congressional consent to the taxation of shares in state banks established in *Lander.* The clear intent of section 5219 is to prohibit more favorable treatment of state banks than of national banks. *See Montana Nat'l Bank v. Yellowstone County,* 276 U.S. 499, 504 (1928); *Merchants' Nat'l Bank v. City of Richmond,* 256 U.S. 635, 638-40 (1921); *Mercantile Nat'l Bank v. New York,* 121 U.S. 138 (1887). Consequently, state taxation of state bank shares, as well as of national bank shares, falls within the original exception to the exemption provided by section 3701.

The same conclusion follows without consideration of the express exception. In the absence of that exception, it might be contended that there is a conflict between the 1959 amendment and the provisions of section 5219 consenting to state taxation of bank shares. Such an apparent conflict, however, would not render section 5219 ineffective because of the well-known principle that repeals by implication are not favored. This principle applies to federal statutes as well as state statutes, so that when acts of Congress are in apparent conflict, it is the duty of the courts to regard each as effective in the absence of a clearly expressed congressional intent to the contrary. *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133-34 (1974); *Morton v. Mancari*, 417 U.S. 535, 548 (1974). On this principle both section 5219 and the 1959 amendment can be given effect by construing section 5219 as a specific statute with respect to state taxation of bank shares and, therefore, as prevailing as against the more general exemption of federal securities provided by section 3701. This construction is in accordance with the rule that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 1753 (1980); *Morton v. Mancari, supra; Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). The effect of regarding the more specific statute as controlling is to interpret the provisions of the specific statute as an exception to the general statute. *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 198 S.W.2d 879, 881 (1947); *Sheffield v. State*, 307 S.W.2d 100, 104 (Tex. Crim. App. 1957); *Hallum v. Texas Liquor Control Board*, 166 S.W.2d 175, 177 (Tex. Civ. App.—Dallas 1942, writ ref'd).

The theory underlying this rule is explained in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-56 (1976), which involved a question similar to that now before us.

A national bank was sued for violation of the Securities Exchange Act, which provided that suit may be brought in any district where the violation occurred. The bank contended that venue of the suit was governed by a provision of the earlier National Bank Act, which provided that suit against a national bank "may be brought in the district in which such association may be established." The Supreme Court agreed that the earlier statute was controlling and that its more specific venue provision applying to national banks was not repealed by implication. The opinion of Justice Stewart states principles directly applicable to the present case:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' *Morton v. Mancari,* 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). 426 U.S. at 153.

The Court went on to say that when Congress enacted the National Bank Act, it was focusing on the particular

problems of suits against banks, but that when it enacted the general provisions of the Securities Exchange Act, seventy years later, its focus was on the "broad universe of potential defendants subject to that Act." Consequently, under the principle of statutory construction previously stated, the Court held that in the absence of a "clear intention otherwise," the specific venue provision of the earlier National Bank Act controlled. *Id.* at 154.

By similar reasoning in the present case, it is apparent that when Congress enacted section 5219, it was focusing on the particular question of the taxation of bank shares, but when it amended section 3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest, from state and local taxation. Since there is no clear intention manifested by the amendment to extend the exemption to bank shares to the extent of the bank's holdings of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by section 5219.

This conclusion is confirmed by the legislative history of the 1959 amendment, which, though not the controlling evidence of legislative intent, indicates that the purpose of the Congress was to clarify and codify existing interpretations of the exemption rather than to abolish the distinction between a tax on bank shares and a tax on securities held by the bank. The Supreme Court has frequently resorted to committee reports and other legislative history to determine the purpose of statutes which, on their face, appeared no more doubtful than the statute now before us. *See, e.g., United Steelworkers v. Weber,* 443 U.S. 193, 201 (1979); *Muniz v. Hoffman,* 422 U.S. 454, 469 (1975); *United Housing Foundation v. Forman,* 421 U.S. 837, 849 (1975); *Philbrook v. Glodgett,* 421 U.S. 707, 714 (1975); *United States v. American Trucking Ass'n,* 310 U.S. 534, 543-44 (1940).

The legislative history of the 1959 amendment to article 3701 strongly indicates that Congress had no intention to withdraw the consent to state taxation of bank shares provided by section 5219. The amendment was included as section 105 in a bill designated as H.R. 9035, 86th Cong., 1st Sess. (1959), which raised the ceiling on the interest rates on series E and H United States Savings Bonds and made changes in other aspects of debt management. The House Committee on Ways and Means and the Senate Committee on Finance made identical reports to their respective houses concerning H.R. 9035. H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959), S.Rep. No. 909, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News 2769. In these reports the "Summary of Bill" contains the following statement:

> Fourth, the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes. *Id.*

No further reference to section 105 appears in the summary. The "General Statement" included in both of these reports contains the following:

> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. *The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear* that the exemption for Federal obligations extends to every form

> of taxation that would require either the obligation, *or the interest on it,* or both, to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other non-discriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. [Emphasis added.] *Id.* at 2773.

It is noteworthy that the committee reports do not refer to the line of cases beginning with *Van Allen,* although they do refer to decisions holding interest on federal securities to be exempt and state that this interpretation is made explicit by the amendment. It seems highly unlikely that the reporting committees or either house of the Congress intended, by accepting these reports and enacting the proposed legislation, to abolish a distinction which had been well established by Supreme Court decisions and which had been characterized by the Supreme Court as one so "inextricably mixed with all taxing systems" that it "cannot be disregarded without bringing them into confusion which would be little short of chaos." *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907). This legislative history, therefore, confirms our conclusion that the purpose of Congress was to preserve, rather than expand, what the Supreme Court had construed to be the constitutional principle embodied in section 3701. *See Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). Consequently, we hold that the county's tax plan is not illegal because of its failure to deduct the federal securities held by the bank from its net assets in determining the value of its shares.

Discrimination Against Federal Securities

The bank and its shareholders also attack the validity of the county's method of assessing the bank's shares for taxation on the ground that it discriminates against United States obligations as an investment for banks. In an argument supporting this contention, *amici curiae* appearing on behalf of various banking associations assert that this discrimination consists of deducting the assessed value of the bank's real estate in computing the value of the shares without a similar deduction of obligations of the federal government held by the bank. They insist that the tax on bank shares imposed by article 7166 is unconstitutional because it is levied on the difference between the actual cash values of each share and the proportionate amount per share at which the bank's real estate is assessed for taxation. This discrimination, they argue, makes real estate a more attractive investment for the bank than federal securities and, therefore, is an unlawful interference with the federal government's power to borrow money, citing *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935).

We do not agree that the tax is an unlawful discrimination against federal securities. Article 7166 does not exempt the bank's real estate from taxation, but rather requires the bank to render it for taxation separately. In *Schuylkill,* by contrast, the trust company paid no tax on certain securities which were deducted from its assets in computing the tax on its shares because those securities were exempt from taxation. *Schuylkill* holds that to deduct other exempt securities from the bank's assets without deducting also federal securities in computing a tax on the company's shares unlawfully discriminates against federal securities.[6]

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[6]The *Schuylkill* opinion shows that some of the securities exempted by the Pennsylvania statute were shares in corporations which had paid a tax on their capital analogous to the Texas franchise tax. The Court evidently treated these shares like other

No such discrimination is shown in this case.

JUDGMENT

For the reasons stated, our former opinion is withdrawn, the appellees' motion for rehearing is granted, and appellants' motion for rehearing is overruled. Accordingly, the judgment of the trial court is affirmed.

Clarence A. Guittard
Chief Justice

Justices Akin and Robertson concur and join in this opinion.

CONCURRING OPINION BY JUSTICE ROBERTSON
JANUARY 23, 1981

On submission of this case and in the original briefs filed by appellees, section 5219 of the Revised Statutes of the United States was not called to our attention and argued as authorizing taxation such as that here involved. Consequently, that statute was not considered by this court in its original deliberations or opinion. In their motion for rehear-

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exempt shares because the corporations holding them paid no tax. This interpretation of the *Schuylkill* opinion is confirmed by the opinion on the subsequent appeal of that case, *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 (1938). Mr. Justice Roberts, again speaking for the Court, explained his opinion on the earlier appeal as holding "that the exclusion from the base of a proportion of the *tax-exempt* shares of Pennsylvania corporations and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter." (Emphasis added.) This treatment of both classes of shares as exempt from tax, so far as the share-holding corporation is concerned, is consistent with the distinction in *Van Allen*, between a tax on a corporation and a tax on its shareholders, which the first *Schuylkill* opinion expressly recognized and reaffirmed.

ing appellees now, for the first time, raise the consent statute in support of the interpretation they argued for in their original briefs. This argument places the case in a posture entirely distinct from the position in which it was originally presented to this court.

In our original opinion we relied heavily on *Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (Mont. 1978). Apparently, the argument now urged by appellees was not presented to that court either, although it did cite section 5219 (12 U.S.C. § 548) for another proposition. This being so, we must assume that the argument now advanced by appellees was not called to the attention of the Montana court in the form in which it is here argued and thus the argument with which we are presented was not considered by that court.

In *any* case, it is the function of this court, as a representative of the people it serves, to strive for a just resolution of disputes under the law. In *this* case, we are compelled, both legally and morally, to apply the law as enacted by the Congress and as interpreted by our Supreme Court. Anything less would be a breach of that sacred trust invested in us by those we represent.

In view of the foregoing, I concur in the opinion of the Chief Justice affirming the judgment of the lower court.

TED Z. ROBERTSON
Associate Justice

OPINION ON APPELLANTS' MOTION FOR REHEARING

May 1, 1981

The principal point made in the motion for rehearing is that since the express consent to state taxation of bank

shares formerly contained in section 5219 of the Revised Statutes, 12 U.S.C. § 548 (1964), was deleted by the sweeping revision of that section in 1969, there is no longer any congressional consent to taxation of bank shares which can be recognized as an exception to the exemption of federal securities in section 3701 of the Revised Statutes, 31 U.S.C. § 742 (1976). The 1969 revision deletes provisions specifically authorizing certain taxes on national banks and their shareholders and provides simply that a national bank shall be treated as a bank organized under the law of the state where its principal office is located. 12 U.S.C. § 548 (1976).

This argument may be plausible if only the current language of sections 5219 and 3701 is considered apart from the history of these two statutes. Nevertheless, since the revision of section 5219 does not expressly mention taxation of federal securities, the problem is one of construction, and we cannot properly determine the intent of these sections without reference to that history. Since we have concluded, for the reasons stated in our prior opinion, that the 1959 amendment to section 3701 was not intended to extend the tax exemption of federal securities to shares in banks holding federal securities, the question then becomes whether the 1969 revision of section 5219 was intended to have that effect. In considering this question, we are mindful of the rule that tax exemptions are strictly construed against the party asserting the exemption. *Conference of Major Religious Superiors of Women, Inc.* v. *District of Columbia,* 348 F.2d 783, 785 (D.C. Cir. 1965); *Lutkins v. United States,* 312 F.2d 803, 805 (Ct. Cl. 1963).

Our study of the 1969 revision of section 5219 and its legislative history gives no support to the contention that it was intended to extend the exemption so as to restrict the taxation of bank shares. That revision was made by

Public Law 91-156. Act of Dec. 24, 1969, Pub. L. No. 91-156, §§ 1(a), 2(a), 83 Stat. 434. We have examined the proceedings in Congress at the time Public Law 91-156 was under consideration. Cong. Rec. 35399 (November 21, 1969), 38634 (December 12, 1969); 1969 U.S. Code Cong. & Ad. News 1597. Public Law 91-156 delayed final application of the revised section 5219 for two years and provided for that period a temporary amendment by the terms of which the states' authority to tax national banks was broadened to include sales taxes and documentary-stamp taxes, but continued the authority to levy the taxes previously authorized, including bank-share taxes. Public Law 91-156 also directs the board of governors of the Federal Reserve System to make a study of the probable impact on the banking system and other economic effects of the permanent revision. Pursuant to these directions, the board prepared an extensive report to the Committee on Banking, Housing and Urban Affairs of the United States Senate, entitled STATE AND LOCAL TAXATION OF BANKS. Board of Governors of Federal Reserve System, — 92d Cong., 2d Sess., REPORT ON STATE AND LOCAL TAXATION OF BANKS (Comm. Print 1972) (hereinafter cited as STATE AND LOCAL TAXATION OF BANKS). This report reviews the various amendments to section 5219 and confirms the impression stated in our prior opinion that the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 9, 24.

According to this report, the intent of Public Law 91-156 to broaden rather than restrict state authority is shown by the fact that its enactment was precipitated by two restrictive decisions of the Supreme Court, *First Agricultural Nat'l Bank v. State Tax Commission*, 392 U.S. 339 (1968), and *Dickinson v. First Nat'l Bank*, 393 U.S. 409 (1969),

which invalidated state sales and use taxes and state documentary-stamp taxes with respect to national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 336. Both the temporary amendment and the permanent revision of section 5219 authorized such taxes. The purpose of the temporary amendment was not to permit the states to find additional sources of revenue in lieu of taxes that would no longer be available, as suggested in the motion for rehearing. Its purposes, rather, were (1) to require the states to enact affirmative legislation if they desired to extend their general taxing statutes to national banks that had previously been exempt from such taxation because of the restrictions in section 5219, (2) to give the states an opportunity to amend statutes that had previously been tied textually to specific authorizations in section 5219, and (3) to continue the prohibition of state and local taxes on intangible property of national banks until the probable impact of such taxes could be studied by the board of governors of the Federal Reserve System. *Id.* at 312-18.

Reviewing the history of bank share taxes, the report recognizes the *Van Allen* rule that such taxes are levied on shareholders rather than on the banks, *id.* at 44, 231-234, 382-395, and also recognizes that in view of large holdings of federal securities by national banks, allowance of deductions for federal securities held by the banks would have the effect of nullifying all share taxes. *Id.* at 233. The report mentions the 1959 amendment to section 3701, 31 U.S.C. § 742 (1976), and proposes modification of the exemption of interest on federal securities. The discussion assumes that the existing exemption of such securities from property taxation would continue. *Id.* at 66, 67. The report gives no indication that either the 1959 amendment to section 3701 or the 1969 revision of section 5219 had any effect, separately or together, on the taxation of bank shares as previously recognized under the *Van Allen* rule.

In Public Law 91-156, Congress recognized the legality of bank shares taxes by continuing the authority of the states to impose these taxes in the temporary amendment, which retains the existing provisions authorizing states to impose certain taxes on national banks, including bank share taxes, and adds authority to impose certain specified additional taxes before the permanent revision takes effect. This continuation would have been pointless if the effectiveness of bank share taxes had been nullified by the 1959 amendment to section 3701. 31 U.S.C. § 742 (1976). That it was not pointless is demonstrated by statistical tables in the report, which show that in 1969-70 bank share taxes were in force in twenty-seven states and formed a substantial portion of the taxes paid by national and state banks at that time. *Id.* at 17, 386-88. Thus, it appears that abrogation of the *Van Allen* rule in 1969 would have had a substantial impact, which is not mentioned in the report.

It is most unlikely that this impact would have been overlooked if the 1969 revision had had the effect of withdrawing previous congressional consent to state taxation of the full shareholder interest in national bank shares as previously provided in section 5219, because Congress in 1969, as well as in earlier years, was sensitive to both the interests of the banking industry and the revenue needs of the state and local governments, as both the text of Public Law 91-156 and the report of the board of governors demonstrate. There is no evidence, however, in any legislative history that Congress considered either in 1959 or 1969 the economic impact of abrogation of the *Van Allen* rule, which the supreme court had previously recognized as one that could not be disregarded without bringing state and local taxing systems into confusion little short of chaos. *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907).

In the present case, the banks and their shareholders recognize in their motion for rehearing that the *Van Allen* rule originally rested on two grounds, (1) the distinction between taxation of shares and taxation of bank assets, and (2) congressional consent to state taxation of bank shares, as expressed in section 5219. Each of these grounds was sufficient in itself to uphold the validity of bank share taxes without any deduction for federal securities held by the banks. Neither the 1959 amendment to section 3701 nor the 1969 revision to section 5219 expressly abolishes this rule. The 1959 amendment does not affect the consent ground. Neither does the 1969 revision of section 5219 abrogate the *Van Allen* rule because its sweeping language clearly broadens rather than restricts the states' authority to levy taxes by giving them authority to treat national banks the same as state banks. If national banks must be treated the same as state banks, then shareholders in national banks must be treated the same as shareholders in state banks. Since the power of the states to tax the shares of state banks does not depend on congressional consent, except to the extent that federal securities may be involved, the *Van Allen* rule, previously applicable to state banks and their shareholders under the *Lander* decision, was continued by the 1969 revision with respect to national banks and their shareholders, whatever its original basis may have been. To hold that Congress intended by the 1969 revision to withdraw its consent to state taxation of bank shares to the extent of federal securities held by the banks is neither required by the language of Public Law 91-156, nor by any reasonable interpretation of that law in the light of its legislative history. Such a holding would be contrary to the principle above stated that tax exemptions are strictly construed against the party asserting the exemption. Consequently, we adhere to our opinion that the county properly assessed the tax on the shares of stock in question without

any allowance or deduction for federal securities held by the bank.

Appellants' motion for rehearing is overruled.

CLARENCE A. GUITTARD
Chief Justice

PUBLISH

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

Friday, January 23, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, John Childs, et al, have recover of and from the appellant, Bank of Texas, and from Troy R. Smith, Jr. and Brenda Maiden their sureties on appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Friday, May 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-451, BANK OF TEXAS ET AL, v. JOHN CHILDS, ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard and
Justices Akin and Robertson
Opinion by Chief Justice Guittard
January 23, 1981

OPINION
ON MOTION FOR REHEARING

For the reasons stated in our opinion of this date in No. 20660, Bank of Texas, et al v. John Childs, et al, 615 S.W.2d 810 (Tex. Civ. App.-Dallas 1981), our former opinion is withdrawn, appellees' motion for rehearing is granted, appellants' motion for rehearing is overruled, and the judgment of the district court is affirmed.

CLARENCE A. GUITTARD
Chief Justice

Justices Akin and Robertson concur.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,
v.
JOHN CHILDS, et al.

Friday, January 23, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, John Childs, et al, have and recover of and from the appellants, Wynnewood Bank & Trust, et al, and from Vic R. Moerbe and Robert S. Jones, their sureties on appeal bond, all costs in this behalf incurred or expended, for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,
Appellants,

v.

JOHN CHILDS, et al.,
Appellees.

Friday, May 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-453, WYNNEWOOD BANK & TRUST ET AL, v. JOHN CHILDS ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Roberston
Opinion by Justice Robertson
November 7, 1980

OPINION

This is an action for mandamus, injunction, and declaratory judgment filed by the Bank of Texas and all of its shareholders against Dallas County, John Childs individually and as Tax Assessor-Collector of Dallas County, and the Dallas County Board of Equalization. Plaintiffs alleged that the Dallas County tax plan for 1979, which taxes shares of stock in banks, is illegal under state law, or is illegal as implemented under federal law, or, if not prohibited by state or federal law, is unconstitutional. Trial before the court resulted in a judgment for defendants. We reverse and remand with instructions.

[*Note: This opinion was withdrawn by the court below, and replaced by the opinion of the court dated January 23, 1981. See Appendix p. 5a, above*]

Timeliness of Suit

Initially we are faced with appellees' contention that appellants' suit was not timely filed and therefore the judgment of the trial court should be affirmed. The law is settled that a taxpayer may seek the remedies of mandamus and injunction prior to the time the tax plan is put into effect. *City of Arlington v. Cannon*, 153 Tex. 566, 271 S.W.2d 414 (1954). The question in this case is whether appellants filed suit prior to the time the tax plan was put into effect.

The Board of Equalization approved the tax lists of assessed values on July 30, 1979. Taxes were levied and the tax rate was set on August 13, 1979. Appellants filed suit on September 5, 1979. The tax roll recap was corrected and approved by the Board of Equalization on September 17, 1979. Mailing of the tax statements began immediately prior to October 1, 1979. Appellees argue that the actions taken on July 30 and August 13 put the tax plan of Dallas County into effect. We do not agree.

The tax plan of Dallas County for 1979 was put into effect when the corrected tax roll was approved by the Board of Equalization on September 17, 1979. *Del Valle Independent School District Board of Equalization v. Hackett*, 563 S.W.2d 338 (Tex. Civ. App. — Waco 1978, writ ref'd n.r.e.); *Owens-Illinois, Inc. v. Little Cypress-Mauriceville Independent School District*, 481 S.W.2d 477 (Tex. Civ. App. — Beaumont 1972, no writ); *Crocker v. Santo Consolidated Independent School District*, 116 S.W.2d 750, 756 (Tex. Civ. App. — Eastland 1938, writ dism'd). The action of September 17, 1979 was the final action taken by the Board of Equalization and, as such, the date of that action is the date the tax plan was implemented. Since appellants filed suit prior to that time, their suit was timely filed. Appellees' reliance on *Dorman v.*

Ferris Independent School District, 581 S.W.2d 783 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.) and *Zglinski v. Hackett*, 552 S.W.2d 933 (Tex. Civ. App. — Austin 1977, writ ref'd n.r.e.) is misplaced. In both of those cases suit was filed after the final action of the Board of Equalization had been taken.

State Law

Appellants argue that appellees have no authority to tax shares of bank stock under state law and thus the 1979 tax plan is illegal. TEX. REV. CIV. STAT. ANN. art. 7166 states:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with the said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in

> default in the payment of his taxes upon the same. *Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.* [Emphasis added.]

TEX. REV. CIV. STAT. ANN. art. 7150.6 provides in pertinent part:

> (a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . . .

Reading these two statutes together, appellants argue that since article 7166 provides that bank shares may not be taxed at a greater rate than is assessed against other moneyed capital in the hands of individuals, and since article 7150.6 expressly prohibited any tax on moneyed capital in the hands of individuals, any tax on bank shares must be at a greater rate than is assessed against other moneyed capital in the hands of individuals and thus prohibited by article 7166.

Appellants stipulated at oral argument that if their construction of these two statutes is correct, article 7150.6 effectively repeals article 7166 by implication. We do not agree with appellants' construction of these statutes. Article 7150.6 prohibits taxation of all intangible property except as provided for in certain specified statutes. One of those statutes is article 7166. If the intention of the legislature were to repeal article 7166 by enacting article 7150.6, the provision in article 7150.6 for taxation under article 7166 would be unnecessary. It is generally presumed that every word in a statute is used for a purpose, *Bomar v. Trinity National Life and Accident Insurance Company,*

579 S.W.2d 464 (Tex. 1979), and it must be presumed that the legislature did not intend to do a useless thing. *Brown v. Memorial Villages Water Authority,* 361 S.W.2d 453 (Tex. Civ. App. — Houston 1962, writ ref'd n.r.e.). Old and new statutes that are not positively repugnant should be construed so as to give effect, if possible, to both because repeal by implication is not favored. *Standard v. Sadler,* 383 S.W.2d 391 (Tex. 1964). The only part of article 7166 that cannot be reconciled with article 7150.6 is the last sentence. Consequently, we hold that only the last sentence of article 7166 was impliedly repealed by article 7150.6. After reading the two statutes together, and giving effect to both to the extent possible, we hold that the county has authority to tax bank shares. Accordingly, we overrule appellants' point of error complaining of lack of authority to tax under state law.

Federal Law

Article 7166 provides that shares of bank stock are to be taxed only for the difference between their actual cash value and the proportionate amount per share at which the bank's real estate is assessed. Dallas County determined the actual cash value of the shares in this case by totaling the capital accounts of the bank, subtracting therefrom the assessed value of real estate and dividing by the number of shares. Included in the capital accounts of the bank were all United States obligations owned by the bank. Appellants argue that computing the actual cash value of the shares of bank stock in this way violates the exemption from state and local taxation of obligations of the federal government provided by 31 U.S.C. § 742. We agree. 31 U.S.C. § 742 states:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State

> or municipal or local authority. *This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. [Emphasis added.]

Appellees argue that the tax in question is a tax on bank shares assessed against the stockholders, and not a tax upon the federal obligations owned by the bank. Citing *Van Allen v. Assessors,* 3 Wall 573, 18 L.Ed. 229 (1886), and subsequent supreme court decisions, appellees argue that the supreme court has consistently upheld taxes such as the one here. Each of the cases cited by appellees was decided prior to 1959.

In 1959 section 742 was amended to include the second sentence. The only cases construing section 742 after it was amended are *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978); and *First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913 (1978). In both of those cases the Supreme Court of Montana held that a tax on shareholders that *considered* the value of United States obligations owned by the bank violated section 742. That court stated:

> The language of the 1959 amendment is clear, unambiguous, direct and certain. The plain language provides an exemption to *every form of state taxation that requires United States obligations or interest to be considered directly or indirectly in the computation of the tax.* The statute speaks for itself. [Emphasis in original.] *Montana Bankers Association v. Montana Department of Revenue, supra* at 912.

We agree. We find nothing ambiguous or unclear in the statute. Both parties before us argue the legislative history of section 742 in support of their positions, but neither party argues that the statute is ambiguous. When confronted with a statute which is plain and unambiguous on its face, courts do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *Fairport P. & E. R. Co. v. Meredith,* 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1934); *Wilbur v. United States,* 284 U.S. 231, 52 S.Ct. 113, 76 L.Ed. 261 (1931); *Brazos River Authority v. City of Graham,* 163 Tex. 167, 354 S.W.2d 99 (1961); *Board of Insurance Commissioners of Texas v. Guardian Life Insurance Co. of Texas,* 142 Tex. 630, 180 S.W.2d 906 (1944); *Baylor University Medical Center v. Borders,* 581 S.W.2d 731 (Tex. Civ. App. — Dallas 1979, writ ref'd n.r.e.).[1] We hold that the plain language of section 742 as amended exempts United States obligations from being considered in the computation of any state or municipal or local tax. The tax here in question is illegal because United States obligations were included in determining the actual cash value of the property to be taxed.

We do not hold that article 7166 is invalid as being contrary to the Supremacy Clause of the United States Constitution. We hold only that the tax plan adopted by the county under the authority of article 7166 is illegal because that plan does not make a proper assessment of taxable value. It will not be presumed that the legislature intended to enact a statute contrary to the federal constitution and

---

[1] Although § 3.03(3) of the Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Supp. 1980) provides that a court construing a statute may consider the legislative history of the statute whether or not the statute is considered ambiguous on its face, the Code Construction Act does not apply to federal statutes. *See id.* § 1.02.

laws. *City of Waco v. Texas Life Insurance Co.*, 248 S.W. 315, 318 (Tex. Comm'n App. 1923, judgmt. adopted). Therefore, article 7166 necessarily excludes United States obligations from the computation of actual cash value.

Substantial Injury

Appellees argue that appellants are not entitled to injunctive relief because, under the rule of *City of Arlington v. Cannon, supra,* appellants have not shown substantial injury. Citing Thompson v. City of Houston, 410 S.W.2d 813 (Tex. Civ. App. — Houston 1967, writ ref'd n.r.e.) and *Anderson County Taxpayers' League v. City of Palestine,* 576 S.W.2d 679 (Tex. Civ. App. — Tyler 1979, no writ), appellees argue that for appellants to show substantial injury they must show that each appellant's *total* tax bill will be substantially raised if the tax plan is put into effect. We do not agree. *Cannon, Thompson,* and *Anderson County Taxpayers' League* were inequality cases in which the plaintiffs had to show that the discrimination alleged worked to their detriment by assessing their property at a higher proportion of its true value than other classes of property. These cases do not hold that in *any* tax case the taxpayer must show his total tax bill, considering all kinds of property he owns, will be substantially raised if the tax plan is put into effect. Neither do they hold that the question of substantial injury should be determined by assuming an increase in the tax rate to compensate for any taxes found to be illegally assessed.

The case before us is not an inequality case. It is not necessary for appellants to show discrimination in order to prevail. It is sufficient for appellants in this case to show that the tax is illegal and that they are the objects of the illegal taxing scheme. *See City of Wichita Falls v. Cooper,* 170 S.W.2d 777 (Tex. Civ. App. — Fort Worth 1943, writ ref'd). In this case appellants have shown substantial in-

jury by showing the difference between the amount of tax on the bank shares they will be required to pay when federal obligations are considered in computing the tax and the amount of tax they would be required to pay when federal obligations are not considered in computing the tax.

Constitutional Challenges

Appellants attack the 1979 Dallas County tax scheme on various constitutional grounds. Since we have held that the tax assessed against appellants is illegal under federal law, we need not reach appellants' constitutional arguments and we decline to do so. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Since we have held the tax illegal, we reverse the judgment of the trial court. As there is no indication that the case has not been fully developed, we need not order another trial. On grounds hereinabove indicated, it is our opinion that plaintiffs are entitled to the final injunction as prayed, and that the trial court should have rendered judgment invalidating the assessments complained of. The trial court is therefore instructed to render judgment granting the injunction in accordance with this opinion.

Reversed and remanded with instructions.

TED Z. ROBERTSON
Associate Justice

Earlier Forms of Section 5219, Revised Statutes of the United States

1864

Provided, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further,* That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: *Provided, also,* That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed. (Act June 3, 1864. C. 106, Sec. 41; 13 Stat. L. 112.)

1868

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "place where the bank is located, and not elsewhere," in section forty-one of the "act to provide a national currency," approved June third, eighteen hundred and sixty-four, shall be construed and held to mean the State within which the bank is located; and the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *And provided always,* That the shares of any na-

tional bank owned by non-residents of any State shall be taxed in the city or town where said bank is located, and not elsewhere. (Act Feb 10, 1868. C. 7; 15 Stat. L. 34.)

1923

SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or net income as above provided of any national banking association owned by nonresidents of any State, or the dividends on such shares owned by such nonresidents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income, and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (Act Mar. 4, 1923. C. 267; 42 Stat. L. 1499.)

1926

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other

moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits; *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also include dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing

district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.

Joint Appendix

Office-Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,

No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

JOINT APPENDIX

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Petition for Certiorari Filed March 17, 1982.
Certiorari Granted November 1, 1982.

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Notes: 1. All page references in brackets are to the Statement of Facts (the state designation for the transcript of proceedings), unless preceded by "Tr.", which refers to the Transcript, the state designation of the court papers on file.

2. Petitioners here were plaintiffs in the trial court, and appellants in the court below.

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CHRONOLOGICAL LIST OF IMPORTANT DATES IN CASE NO. 20915

Date	Filing, Hearing or Court Action
December 23, 1980	Plaintiffs' Trial Petition Filed*
January 6, 1981	Trial Commenced
February 5, 1981	Judgment Entered by Trial Court
February 20, 1981	Appeal Perfected to Dallas Court of Civil Appeals**
June 3, 1981	Judgment Entered by Dallas Court of Civil Appeals
June 18, 1981	Motion for Rehearing Filed
July 1, 1981	Motion for Rehearing Denied by Dallas Court of Civil Appeals
July 30, 1981	Application for Writ of Error Filed
January 6, 1982	Application for Writ of Error Denied by Texas Supreme Court
March 17, 1982	Petition for Writ of Certiorari Filed
November 1, 1982	Writ of Certiorari Granted

*On December 17 and 18, 1980 the trial court consolidated four then pending cases involving the same issues into this case and this pleading was then filed on behalf of all of the plaintiff petitioners.

**After the decisions below, the name of the court below was changed from the "Court of *Civil* Appeals" to the "Court of Appeals." Tex. Const. art. V, § 6.

[Tr. 19]

(Note: This case No. 80-4660-A was subsequently consolidated into this case by the trial court. See footnote on page 1, above.)

No. 80-4660-A

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS,
14TH JUDICIAL DISTRICT

AMERICAN NATIONAL BANK; CENTURY BANK & TRUST CO.; FIRST SECURITY BANK OF GARLAND, N.C.; GARLAND BANK & TRUST CO.; TEXAS COMMERCE BANK - GARLAND; FIRST NATIONAL BANK; H. A. WALKER AND WOODROW O. BROWNLEE

v.

DALLAS COUNTY, TEXAS; JOHN CHILDS, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR OF DALLAS COUNTY, TEXAS; CITY OF GARLAND, TEXAS; TOM LANDRUM, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR OF THE CITY OF GARLAND; THE GARLAND INDEPENDENT SCHOOL DISTRICT; J. W. WALL, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

Plea in Abatement and Motion to Dismiss of Defendants Dallas County, Texas, John Childs, Tax Assessor-Collector of Dallas County, Texas, Garland Independent School District and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, and Their Original Answer Subject Thereto

To The Honorable Judge of Said Court:

Now come Dallas County, Texas, John Childs, individually and as Tax Assessor-Collector of Dallas County, Texas, the Garland Independent School District, and J. W. Walls, individually and as Tax Assessor-Collector for the Garland Independent School District, defendants in the above entitled and numbered cause, and file this, their Plea in Abatement and Motion to Dismiss, and their Original Answer Subject Thereto, and for such would show the Court as follows:

I.

There is no justiciable controversy between the parties in this cause. Plaintiffs have no standing to bring this suit since:

(1) Plaintiffs' contention that, as a result of Article 7166 of the Texas Revised Civil Statutes and Section 11.02 of the Texas Property Tax Code, and Title 31 U.S.C., Sec. 742, certain alleged illegal amounts of taxes will be collected from them **[Tr. 20]** and an alleged illegal lien will be placed on their stock is premature and untimely since no taxes have been levied by any defendant at this time.

(2) The statutory provisions provide for the plaintiffs to render their property and, if they do timely render and are not in agreement with the Tax Assessor-Collector as to the value of the property, they may have a hearing before the Equalization Board of each taxing entity and present their questions of fact and/or law.

(3) If the plaintiffs are still in agreement with the decision of the Equalization Board as to the value of their property, there may never be a controversy between the parties, but

(4) If plaintiffs are in disagreement with the value placed on their property, Article 7345f, V.A.T.S., provides for a method of appealing the values placed thereon to District Court.

II.

This suit, at this time, amounts to nothing more than asking the Court for an advisory opinion which is not within the jurisdiction of this Court.

III.

Plaintiffs' suit should be abated and dismissed since the Court has no jurisdiction of the alleged claims and there is no justiciable controversy between the parties at this time.

WHEREFORE, PREMISES CONSIDERED, these defendants pray that the Plea in Abatement and Motion to Dismiss be in all things granted and that plaintiffs take nothing by their suit.

(Affidavit and signature omitted in printing)

[Tr. 22] DEFENDANTS' ORIGINAL ANSWER, SUBJECT TO THEIR PLEA IN ABATEMENT AND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Dallas County, Texas, John Childs, individually and as Tax Assessor-Collector of Dallas County, Texas, the Garland Independent School District, and J. W. Walls, individually and as Tax Assessor-Collector for the Garland Independent School District, defendants in the above entitled and numbered cause, and subject to their Plea and Abatement and Motion to Dismiss, and without

waiving same, file this, their Original Answer to Plaintiffs' Original Petition, and for such would show the Court the following:

1.

These defendants would show that the designation of, and allegations by the individual shareholders as plaintiffs do not meet the requirements of Rule 42, T.R.C.P., in that the shareholder plaintiffs are not representative of all classes of bank shareholders. The shares of several of the plaintiffs are totally owned by a holding company which is entitled to all dividends and only their board members hold legal title to qualifying shares with no rights to the dividends, hence, there is no necessity for a class action in view of the small number of shareholders and, therefore, this action should not be certified as a class action under Rule 42, T.R.C.P., with shareholder plaintiffs as the class representatives.

2.

These defendants deny each and every, all and singular, the allegations contained in Plaintiffs' Original Petition, demand strict proof thereof, and of this they put themselves upon the country.

3.

These defendants would show that no justiciable controversy exists between plaintiffs and these defendants, in that the tax rolls for 1980 have not yet been adopted by Dallas County or the Garland Independent School District, nor has there been, and [Tr. 23] plaintiffs have not alleged, any attempt to levy, assess or collect from any of the plaintiffs the tax in question, therefore the prerequisites to maintaining this action have not been met.

4.

Answering further if need there be, these defendants would show that Section 11.02 of the Texas Property Code is a valid exercise of legislative power which establishes classifications of personal property for the purpose of taxation and imposes the same tax on all shares of bank stock, which value for tax purposes is established by Art. 7166, V.A.T.S. Such tax meets the Constitutional requirement of being applied in an equal and uniform manner within the class being taxed and constitutes a balance of the respective interest of the property holders in the State. Such act is consistent with the various provisions of the State and Federal Constitutions and does not violate any of the provisions of either of such Constitutions.

5.

These defendants would further show that by virtue of Title 12, U.S.C., Section 548, Congress has specifically consented to the taxation of shares in a national bank by the states in accord with each state's legislative plan for taxation.

6.

Further, if such be necessary, these defendants would show that Title 31, U.S.C., Section 742, does not require the deletion or deduction of United States government obligations held by the bank plaintiffs prior to determining the value of the capital stock in question. Such Act, as amended, is a mere codification of existing judicial decisions which had specifically approved the method followed by these defendants in ascertaining market value of bank stock.

[Tr. 24] WHEREFORE, PREMISES CONSIDERED, these defendants pray that plaintiffs take nothing by this suit and for such other and further relief, general and special, at law and in equity, to which these defendants may be entitled, and that these defendants go hence with their costs without day.

(Signatures omitted in printing)

[Tr. 37]
No. 80-3206-G

In The District Court
Dallas County, Texas
134th District Court

American Bank and Trust, et al.,
Plaintiffs,

v.

Dallas County, Texas, et al.,
Defendants.

Plaintiff's Second Amended Petition
and Application for Injunction

To the Honorable Court:

Plaintiffs, complaining of the defendants, respectfully allege:

PARTIES

Plaintiffs

1. (a) Each of the following plaintiffs is a duly incorporated state or national banking corporation in Dallas County, Texas except Canyon Creek National Bank which is in Collin County, Texas:

American Bank and Trust
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Co.
Citizens National Bank of Dallas
Dallas International Bank
Dallas National Bank
Equitable Bank
First Citizens Bank

First City Bank of Dallas
First Continental Bank
First National Bank in Dallas
First National Bank in Garland
First Security Bank of Dallas, N.A.
First Security Bank of Garland
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank
Greenville Avenue Bank and Trust
Grove State Bank
Inwood National Bank of Dallas
Lakewood Bank & Trust Co.
Love Field National Bank
Mercantile National Bank at Dallas
MetroBank of Dallas
[Tr. 38] National Bank of Commerce
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank & Trust Co.
Pan American National Bank of Dallas
Park Cities Bank
Preston State Bank
Prestonwood National Bank
Republic National Bank of Dallas
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank — Campbell Centre
Texas Commerce Bank — Casa Linda
Texas Commerce Bank — Dallas, N.A.
Texas Commerce Bank — Garland
Texas Commerce Bank — Northwest
Texas Commerce Bank — Park Central
Texas Commerce Bank — Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank
White Rock Bank of Dallas
Wynnewood Bank and Trust

All such national and state bank plaintiffs are herein called "Bank-plaintiffs."

(b) Plaintiffs Richard M. Hart, Frank Marshall, Ronald G. Steinhart, Peyton Cooper, Charles N. Brewer, Lynn D. Turner, H. A. Walker, and Woodrow Brownlee (herein called "Shareholder-plaintiffs") each is a member of the class certified by this Court on December 18, 1980, and they are the representatives of such class appointed by the Court.

(c) The class certified by the Court and represented by the Shareholder-plaintiffs is composed of the shareholders of the Bank-plaintiffs on January 1, 1980 (the "Class" herein).

Defendants

Taxing Districts ("Districts")

2. (a) Defendant Dallas County is a duly organized and existing subdivision of the State of Texas.

(b) Defendants City of Dallas, City of Richardson and City of Garland are all duly organized and existing incorporated cities of the State of Texas; defendant Town of Highland Park is a duly organized and existing incorporated town of the State of Texas.

(c) Defendants Dallas Independent School District, Richardson Independent School District, **[Tr. 39]** Garland Independent School District, and Highland Park Independent School District are independent school districts duly organized and existing under the laws of the State of Texas.

(d) Defendants John Childs, Max Noller, Joy Montgomery, Ernest R. Richardson, and N. G. Johnson were the duly qualified and acting tax assessor-collectors during 1979 and 1980 for Dallas County, the City of Dallas and the Dallas Independent School District, the Town of Highland Park, and the Highland Park Independent School District, and the Richardson Independent School District respectively.

(e) Defendant Board of Equalization of the Richardson Independent School District is the duly organized and existing board of equalization of the Richardson Independent School District; and defendants Jerry Sloan, Nelson McCord, and Morris James were the members of said board of equalization during 1980.

(f) Defendant Board of Equalization of the Town of Highland Park is the duly organized and existing board of equalization of the Town of Highland Park; and defendants Frank R. Garrott, John Taylor, and George Nicaud were the members of said board of equalization during 1980.

(g) Defendant Board of Equalization of the Highland Park Independent School District is the duly organized and existing board of equalization of the Highland Park Independent School District; and defendants Dr. Wendell A. Jones, Robert E. Titus, and Harris E. Yarbrough, Jr., were the members of said board of equalization during 1980.

(h) Defendant Board of Equalization of the City of Dallas and the Dallas Independent School District is the duly organized and existing board of equalization [Tr. 40] of the City of Dallas and the Dallas Independent School District; and defendants Port E. Stages, Jr., A. C. Moser, Jr., Dorothy Ramsey, and Jim S. Lake were the members of said board of equalization during 1980.

(i) Defendant Board of Equalization of Dallas County, Texas, is the duly organized and existing County Commissioners Court of Dallas County sitting as the Board of Equalization of Dallas County; and defendants Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr were the members of said Board of Equalization during 1980.

The Attorney General of the State of Texas has been served with a copy of the Plaintiffs' Original Petition,

Plaintiffs' First Amended Petition and Application for Temporary Injunction, and is being served with a copy of this Second Amended Petition, and is entitled to be heard in this cause pursuant to Texas Revised Civil Statutes Art. 2524-1, § 11.

3. Shareholder-plaintiffs and the class represented by Shareholder-plaintiffs were the owners and holders of shares of Bank-plaintiffs' outstanding stock on January 1, 1980. The defendant taxing districts which are the situs of said shares and of which the various plaintiffs complain respectively are:

(a) Dallas County:

The shares in all Bank-plaintiffs, except:

First Continental Bank (taxes already paid)
Canyon Creek National Bank

(b) City of Dallas:

The shares in all Bank-plaintiffs, except:

American National Bank of Garland
Canyon Creek National Bank
Century Bank & Trust
First National Bank in Garland
[Tr. 41] First National Bank in Lancaster
First Security Bank in Garland
Garland Bank & Trust Co.
Park Cities Bank
Texas Commerce Bank — Garland

(c) Town of Highland Park:

The shares in Park Cities Bank

(d) City of Richardson

Canyon Creek National Bank

(e) City of Garland

The shares in the following Bank-Plaintiffs:

American National Bank of Garland
Century Bank & Trust
First National Bank in Garland
First Security Bank in Garland
Garland Bank & Trust Co.
Texas Commerce Bank — Garland

(f) Dallas Independent School District:

The shares in all Bank-plaintiffs, except:

American National Bank of Garland
Century Bank & Trust
Equitable Bank
First National Bank in Garland
First Security Bank in Garland
Garland Bank & Trust Co.
Park Cities Bank
Preston State Bank
Texas Commerce Bank — Garland
Texas Commerce Bank — Park Central
Valley View Bank
White Rock Bank

(g) Richardson Independent School District:

The shares in the following Bank-plaintiffs:

Equitable Bank
Texas Commerce Bank — Park Central
Valley View Bank
White Rock Bank

(h) Garland Independent School District:

The shares in the following Bank-plaintiffs:

American National Bank of Garland
Century Bank & Trust
First National Bank in Garland
[Tr. 42] First Security Bank in Garland
Garland Bank & Trust Co.
Texas Commerce Bank — Garland

(i) Highland Park Independent School District:

Park Cities Bank
Preston State Bank

THE BANK SHARE TAX

4. Section 11.02 of the Texas Property Tax Code provides:

(a) Except as provided by Section (b) of this section, intangible personal property is not taxable.

(b) Stock in a banking corporation, intangible property of an unincorporated bank, intangible property of a transportation business listed in Subchapter A, Chapter 24 of this code, and intangible property governed by Article 4.01, Insurance Code, or by Section 11.09, Texas Savings & Loan Act, are taxable as provided by law, unless exempt by law, if this state has jurisdiction to tax those intangibles . . .

Article 7166 of the Texas Revised Civil Statutes provides:

> Every banking corporation, State or national, doing business in this State shall, in the city of town in which it is located, render its real estate to the tax

assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city of town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

[Tr. 43] Under the laws of the State of Texas, no shares of stock in any corporation are taxable ad valorem except shares of incorporated banks.

TAX COLLECTION PRACTICE

5. If the tax assessed against the Class under Section 11.02 of the Texas Property Tax Code is not paid, the Shareholder-plaintiffs and the members of the Class will be ultimately liable for the tax, and under Article 7166 of the Texas Revised Civil Statutes the Bank-plaintiffs will be forbidden by law from transferring any shares of stock on which the tax is in default and will be prohibited from declaring dividends as to any such shares.

Because of the threat imposed on Bank-plaintiffs by virtue of the provisions in Article 7166 against stock transfers and dividend declarations when payment of the tax is in default, a practice and custom has long been established and followed by Bank-plaintiffs and by defendant Districts and Collectors whereby taxes purported to be imposed by defendant Districts and Collectors on shareholders of Bank-plaintiffs are billed to the banks by said defendants and paid by Bank-plaintiffs on behalf of their respective shareholders to the respective defendants as shown in Paragraph 3. For such reason the tax purportedly imposed upon the class is actually imposed upon the Bank-plaintiffs.

DEFENDANTS' SEEKING TO COLLECT THE TAX

6. Defendants are attempting and proceeding to collect against plaintiffs for the tax year 1980 the ad valorem tax purportedly provided for in Section 11.02 of the Texas Property Tax Code.

TAX UNCONSTITUTIONAL

7. As a matter of law, section 11.02 of the Texas Property Tax Code is unconstitutional in that it provides [Tr. 44] without any rational basis for an ad valorem tax on the stock issued by the Bank-plaintiffs and owned by the Class, while at the same time exempting the stocks of all corporations other than incorporated banks in the State of Texas from ad valorem taxation, and thereby unlawfully discriminates against bank stockholders. Said Section 11.01 is contrary to and in violation of the equal protection clauses of the Fourteenth Amendment to the United States Constitution and of Article I, Section 3 of the Texas Constitution. Accordingly the attempt by defendants to collect such tax and any collection of the tax under the authority of Section 11.02 is unlawful because the statute on which they rely for their authority to collect such a tax is unconstitutional.

TAX CONTRARY TO STATUTE

8. If Section 11.02 were a valid and constitutional law, then plaintiffs allege in the alternative that the relevant taxing statutes have as a matter of law the effect of forbidding the imposition of any tax on shares of stock issued by the Bank-plaintiffs and owned by the members of the Class. Such stock constitutes monied capital in the hands of individuals and Article 7166 of the Texas Revised Civil Statutes expressly provides that the capital stock of state and national banks, and the shareholders thereof, shall not be taxed at a greater rate than is assessed against other monied capital in the hands of individuals. Section 11.02 exempts all other monied capital in the hands of individuals from any taxation by the defendants herein, and any tax on the shares of Bank-plaintiffs owed by the members of the Class would be at a greater rate than the

zero tax on other monied capital. Accordingly the defendants are without lawful authority to levy, assess, impose or collect any taxes against the capital stock issued by the Bank-plaintiffs and owned by the members of the Class.

[Tr. 45] TAX IN VIOLATION OF FEDERAL LAW

9. Defendants are attempting to collect and are proceeding to collect an ad valorem tax for the tax year 1980 on bank shares in Bank-plaintiffs which considers the amount of United States obligations held by Bank-plaintiffs in the computation of the tax.

10. Section 11.12 of the Texas Property Tax Code provides that:

> Property exempt from ad valorem taxation by federal law is exempt from taxation.

11. Title 31 of the United States Code, Section 742, provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The imposition and attempted collection of the tax on members of the Class, considering United States obligations in the computation of the tax, is in direct violation

of the laws of the United States and thus violates the Supremacy clause of Article 6, clause 2, of the United States Constitution.

12. Article 7166 of the Texas Revised Civil Statutes violates federal law in that it purports to consider United States obligations in the computation of the tax.

13. Alternatively, if Article 7166 itself does not violate federal law, then defendant taxing authorities and defendant tax assessor-collectors violate federal law in the taxation of bank stock because the method of imposing, assessing and collecting the bank shares tax considers United States obligations owned by the Bank-plaintiffs in the computation of the tax, in violation of federal law, and thus is unconstitutional as [Tr. 46] in violation of the Supremacy clause of the United States Constitution.

14. In addition, the failure of defendants to deduct federal obligations in computing the tax while real estate owned by the Bank-plaintiffs is deducted in computing the tax discriminates against federal obligations in violation of federal law and any such assessment of a tax is therefore unconstitutional as in violation of the Supremacy clause of the United States Constitution.

DENIAL OF RELIEF BY DEFENDANT BOARDS

15. Because as a matter of law the bank share tax sought to be collected is illegal, plaintiffs were not and are not required to seek relief before defendant Boards. Nevertheless, though not required to do so, all plaintiffs, except First Continental Bank, duly and regularly appeared before each of the respective defendant Boards as set forth in paragraph 3, made the assertions and claimed the rights set forth in paragraph 4-14, and demanded relief accordingly. Any and all relief was refused plaintiffs

by the respective boards and the actions of defendant Districts and Collectors in threatening and proceeding to levy, assess, impose and collect the ad valorem bank share tax for the tax year 1980 on bank shares was affirmed and the protest of plaintiffs rejected.

DECLARATORY JUDGMENT

16. Plaintiffs are persons whose legal relations are affected by the interpretation of Article 7166, Texas Revised Civil Statutes, and of Section 11.02 of the Texas Property Tax Code, and plaintiffs are entitled to declaratory relief under Article 2524-1, Texas Revised Civil Statutes. Plaintiffs are entitled to a declaratory judgment that (1) Section 11.02 is unconstitutional; (2) in the alternative under Section 11.02 in conjunction **[Tr. 47]** with Article 7166 there is no authority to assess any tax whatsoever upon any stock of Bank-plaintiffs; (3) Article 7166 discriminates against United States obligations and is therefore unlawful; (4) if the statutes of Texas lawfully authorize a tax on bank shares, any administration of such tax which considers United States obligations held by Bank-plaintiffs in computing the tax is illegal, and if such administration is mandated by Article 7166 that article is illegal; (5) the only tax which could be lawfully assessed and collected is one which does not consider United States obligations for the purpose of computing tax on shares of Bank-plaintiffs, for the year 1980 no tax is due unless and until defendants lawfully assess the shares in Bank-plaintiffs without considering United States obligations in the computation of the tax, until such reassessment occurs there is no tax due on Bank-plaintiffs' shares owned by the Class, and thus no such taxes can be delinquent; (6) until such reassessment occurs there is no lien upon the shares of Bank-plaintiffs and Bank-plaintiffs

shall be free of any restriction on Bank-plaintiffs' stock sought to be imposed by Article 7166 (which restricts Bank-plaintiffs' rights to declare dividends and transfer shares).

INJUNCTION

17. Defendants should be restrained and enjoined from carrying out their illegal acts hereinabove alleged. Plaintiffs will suffer irreparable injury, loss and damage unless such injunction is issued. Should the plaintiffs fail to pay the tax on shares in Bank-plaintiffs and permit the taxes allegedly to become in default, Article 7166 forbids Bank-plaintiffs from paying dividends or transferring stock on their books. **[Tr. 48]** Plaintiffs are therefore entitled to relief through this Court's issuance of a temporary injunction and, upon final hearing hereof, a permanent injunction against defendants enjoining defendants, their agents, servants, and employees from:

(a) Attempting to collect by whatever means any ad valorem taxes for the tax year 1980 on shares of Bank-plaintiffs held by the Shareholder-plaintiffs and the shareholder Class.

(b) Doing any act calculated or intended to enforce or attempt to enforce any assessments or collection of taxes on shares in Bank-plaintiffs including, but not limited to, any attempt to restrict the rights of the Bank-plaintiffs to transfer shares or declare and pay dividends to their shareholders.

(c) In all future assessments of bank share taxes, if any are held to be lawful, considering United States obligations held by Bank-plaintiffs in ascertaining the banks' capital for the purpose of computing any tax on shares of Bank-plaintiffs.

Plaintiffs are willing, able and hereby offer to furnish security in accordance with law, as may be directed by the Court.

PRAYER

WHEREFORE, premises considered, plaintiffs pray: (1) that defendants be cited to appear and show cause, if any they have, why a preliminary injunction as set forth in paragraph 17 should not be issued; (2) that upon final **[Tr. 49]** hearing said injunction be made permanent; (3) for declaratory relief as set forth in paragraph 16; (4) for attorneys' fees and expenses for the Class in accordance with law; (5) for plaintiffs' costs; and (6) for general relief.

(Affidavit and Signature omitted in printing)

[Tr. 51]
No. 80-3206-G

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

AMERICAN BANK AND TRUST, et al.
VS.
DALLAS COUNTY, TEXAS, et al.

SECOND AMENDED PLEA IN ABATEMENT AND MOTION TO DISMISS OF DEFENDANTS DALLAS COUNTY, TEXAS; JOHN CHILDS, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR OF DALLAS COUNTY, TEXAS; DALLAS COUNTY BOARD OF EQUALIZATION AND ITS MEMBERS AND THEIR THIRD AMENDED ANSWER SUBJECT THERETO

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Dallas County, Texas; John Childs, individually and as Tax Assessor-Collector of Dallas County, Texas; and Dallas County Board of Equalization and its members, defendants in the above styled and numbered cause, and file this, their Second Amended Plea in Abatement and Motion to Dismiss, and their Third Amended Answer Subject Thereto, and for such would show the Court as follows:

I.

There is no justiciable controversy between the parties which would entitle them to the remedies sought.

(a) At the time of filing of this action, no taxes had been levied against plaintiffs, nor had they pur-

sued legal remedies available to them if such taxes were levied and the plaintiffs believed such taxes to be illegal.

(b) If plaintiffs are in disagreement with the value placed on their property, and have been unable to obtain satisfaction before the Board of Equalization at the hearing provided by law, then Art. 7345f, V.A.T.S., provides for a method of appealing the values placed thereon to district court, and the same provides an adequate remedy at law for plaintiffs.

[Tr. 52] (c) Since plaintiffs contend they may not be taxed at all, they may raise the issues as defenses to any action brought against them to collect taxes.

Therefore, plaintiffs have not pursued their legal remedies and the suit herein should be abated and dismissed.

II.

This cause of action should be abated and dismissed as to the request for mandamus because plaintiffs do not have standing to bring mandamus against a public official to cause such official to do his job.

III.

Plaintiffs' suit should be abated and dismissed since the Court has no jurisdiction of the alleged claims and there is no justiciable controversy between the parties at this time.

IV.

In the alternative, this cause should be abated and dismissed as to plaintiff Banks and defendants. The tax in

dispute is levied against stockholders and not against banks, and plaintiff Banks are not proper parties to contest such tax.

WHEREFORE, PREMISES CONSIDERED, these defendants pray that their Second Amended Plea in Abatement and Motion to Dismiss be in all things granted and that plaintiffs take nothing by their suit.

(Signature omitted in printing).

[Tr. 53]

DEFENDANTS' THIRD AMENDED ANSWER
SUBJECT TO THEIR SECOND AMENDED PLEA
IN ABATEMENT AND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Dallas County, Texas, John Childs, individually and as Tax Assessor-Collector of Dallas County, Texas, and the Dallas County Board of Equalization and its members, defendants in the above entitled and numbered cause and, subject to their Second Amended Plea in Abatement and Motion to Dismiss, and without waiving same, file this, their Third Amended Answer to Plaintiffs' Second Amended Petition, and for such would show the Court the following:

I.

Maintenance of this action as a class action under Rule 42 of the Texas Rules of Civil Procedure is unnecessary, impossible and impermissible. This action does not satisfy the prerequisites for a class action, and the designated class representative is not a proper or sufficient class representative. Furthermore, if the Bank plaintiffs are proper parties, then they will sufficiently represent the interest of their shareholders as agent so that no class action is required.

II.

Defendants deny each and every allegation contained in Plaintiffs' Original Petition and in the Amended Petitions of plaintiffs and in each of these petitions, and demand strict proof thereof.

III.

For further answer, defendants would show the Court that § 11.02 of the Texas Property Tax Code and Art. 7166 of V.A.T.S. conjunctively and individually authorize a tax on all shares of bank stock. The tax plan of defendant Dallas County for 1980, as implemented by defendant John Childs, is in compliance with both statutes and is applied in an equal and uniform manner. Since all assessments are lawfully made, all penalties authorized and required under Art. 7166 of V.A.T.S. should apply when such taxes become delinquent.

[Tr. 54] Further, Art. VIII, Sec. I, of the Texas Constitution has been amended so that it is not mandatory that all intangibles be taxed but such is permissible. Section 11.02 of the Texas Property Tax Code, which took effect January 1, 1980, specifically provides for the taxing of bank stock as follows:

> "(a) Except as provided by Subsection (b) of this section, intangible personal property is not taxable.
>
> (b) Stock in a banking corporation, intangible property of an unincorporated bank . . . . are taxable as provided by law . . . ."

Article 7166 states the manner of taxing bank stock and § 11.02 exempts other intangibles except for certain types as set out therein. Article 7166 and § 11.02 are not in conflict and, if they are in conflict, Attorney General's Opinion MW-139 (1980) provides that where two statutes conflict,

the one passed last by the legislature is controlling. The opinion states that:

> "The Construction Act, however, states the following general rule: '. . . if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.'"

Therefore, as stated above, § 11.02, being the last statute passed, is controlling, and other intangibles are thereby exempt from taxation.

IV.

Defendants would also show that Title 31 U.S.C. § 742 does not require the deletion or deduction of United States Government obligations held by the Bank plaintiffs prior to determining the value of the capital stock in question which is owned by others and not the Banks. This tax is against the owner of the stock — not the Banks. The U. S. Government obligations are owned by the Banks. The act, as amended, is a mere codification of existing judicial decisions which specifically approved the method followed by these defendants in ascertaining market value of bank stock. **[Tr. 55]** The fact that the Bank may have a custom of paying the tax is not material and does not change the legal responsibility of the stockholder to pay the tax. Further, since bank stock is not exempt from ad valorem taxation by federal law, Section 11.12 of the Texas Property Tax Code is inapplicable. Since there is no violation of federal law by defendants, it follows that there is no violation of the Supremacy Clause of the United States Constitution.

12 U.S.C. § 548 specifically authorizes taxing stock of national banks and the state law authorizes the taxing of stock of state banks as well as national but in a like manner.

V.

In the alternative, defendants would show the Court that if 31 U.S.C. § 742 requires the deduction or deletion of United States securities from the value of capital stock of the plaintiff Banks, which defendants deny, then defendants allege that only direct obligations of the United States are to be included within any such requirement, and not the obligations of the United States governmental agencies, corporations, or political subdivisions. In the alternative, no direct obligations of the United States should be deducted unless plaintiffs can show that same was purchased solely with assets from the capital account that was used to arrive at the value of the stock and was not, in whole nor in part, purchased with funds from depositors and no United States obligations should be deducted which have been pledged to secure deposits of public funds.

VI.

For further answer, defendants would show the Court that Dallas County had only one tax rate for 1979 and 1980 for all taxable property, including bank stock. Therefore, no bank stock was taxed or threatened to be taxed at any greater rate in 1979 and 1980 in Dallas County than any other property.

VII.

Under Art. 7345f, if plaintiffs were dissatisfied with the value placed on the property in question by the Board of Equalization, they could have appealed the valuation to district court. **[Tr. 56]** Same is an adequate remedy at law and, therefore, plaintiffs should be denied the extraordinary remedies they seek.

VIII.

Plaintiffs have an additional adequate remedy at law in their right to defend any action brought against them to collect the taxes in question, and plaintiffs may have additional legal remedies. Plaintiffs failed to allege they had no such adequate remedy at law.

IX.

Plaintiffs herein do not have standing to bring mandamus against a public official to do his job.

X.

The plaintiff Banks are not proper parties since the tax in question is levied against shareholders and not against the banks. There is no justiciable controversy between the plaintiffs and defendants.

WHEREFORE, PREMISES CONSIDERED, defendants pray that plaintiffs take nothing by their suit, and for such other and further relief to which they may be entitled, for general relief and for their costs of court.

(Signature and Affidavit omitted in printing)

(Excerpts from the testimony at trial in the 134th District Court of Dallas County Texas)

(Excerpts from testimony of respondent Max Noller)

[91] Q Mr. Noller, my name is Brian Lidji, I am **[92]** one of the attorneys for the Plaintiffs in this action. Would you please state your name for the record?

A Max E. Noller.

Q How are you employed, Mr. Noller?

A By the City of Dallas.

Q In what capacity?

A For slightly over the last 11 years, I have been the director of revenue and taxation for the City of Dallas.

Q Is that commonly referred to as the tax assessor/collector?

A Yes, sir.

• • •

Q Are you also the tax assessor/collector for the DISD by contract?

A Yes, sir.

• • •

[105] Q What is a call statement?

A A call statement, as I understand it, is a statement which the State Banking Commission requests the banks to make and it is published in the newspapers of the state, generally, local circulation, in the case of the local banks, and it contains certain types of information and usually the one that the tax departments are interested in is the one that is dated as of December 31st of a particular year. Those statements are published, usually, the first one, two or three weeks in January.

Q Why are you interested in the December 31st call statement?

A The interest in that statement is because of the fact that the assessment date would be January the 1st of each year.

Q Is January 1 a banking holiday?

A I believe that it is, yes, sir.

Q So whatever the call statement reflects on December 31st would be the same as the 1st, which is the tax date?

A I would assume that's correct, yes, sir.

Q So, you use a call statement in your assessment of the bank stock, is that correct?

A The information contained upon the call [106] statements is one of the items which is used with reference to the assessment of banks, that is correct.

Q Do you request that the bank send you a copy of their call statement?

A Yes, we asked that they do that, however, we, in addition, proceed to remove them from the local papers ourselves and have a file in our office of those call statements.

• • •

[109] Q So equity capital on the call statement is the same thing as the capital accounts on the rendition form.

A Those two numbers are the same, yes, sir.

Q The numbers are the same?

A Yes, sir.

• • •

[110] Q Is equity capital equal to assets less liabilities?

A On the call statement, if you add the total equity capital and the sum of the liabilities, I believe that you reach a number which is the sum of the total assets.

• • •

[116] Q So, is it fair to say that all of the banks that are within your taxing jurisdiction, either the City or the School District, that their stock was assessed based on equity capital less the assessed value of real estate, without any other deductions being made from that figure?

A That would be generally correct.

Q Are there any banks within your taxing authority that that would not be correct for?

A Not to my knowledge.

Q You don't know of any that was done any other way?

[117] A No, I do not.

Q Was there any case, in the case of any of these banks, in which your office permitted the deduction of federal obligations?

A To the best of my knowledge, there was none.

Q Why does your office deduct the assessed value of the real estate?

A The statutory provision, which is one of the means that we use in assessing banks, specifically requests that that be done.

Q Do you know why that is done?

A The theory, as I understand it, is that since the real property is being assessed in its own right as other real property is, that if you were to include the assessed

value of the property, you would, in effect, potentially have the doubling of a property on the tax rolls, that is, an assessing of it twice.

Q I see. Now, assuming a bank owed some tax, based on your computation, if you allowed a deduction for federal obligations, would the tax therefore be reduced?

A Based upon our calculations?

Q Yes.

A No.

Q If — you testified that the computation is [118] equity capital less assessed value of real estate and you arrive at a number, to which you apply the tax rate, is that correct?

A That's correct.

Q If from that number you deducted federal obligations, would the total tax to the taxpayer be less?

A If the question is the mathematics of it, obviously, if you have a number and you deduct another number from it, the remainder is a smaller number, so, from that point of view, yes, the tax would be less, if you deduct that number.

• • •

[124] Q Going back to our computation formula, that is equity capital less assessed value of real estate, did you, on the call statements, examine the call statements to see whether there were any U.S. Treasury securities or obligations of other U.S. Government agencies or corporations listed on the call statement?

A That has not been a factor that has been important from the point of view of our office in determining the value of the shareholders' stock and [125] accordingly, it was not taken into account by us.

Q So you did not examine the call statement and make a deduction for any of the assets listed there on the call statement under U.S. Treasury securities or obligations of other U.S. Government agencies and corporations?

A No, sir.

Q Did you make any deductions for any stocks, bonds, Treasury notes or other obligations of the United States or interest thereon?

A No, sir.

• • •

[133] Q Now, with respect to the banks, Mr. Noller, as distinguished from the stockholders, is there one piece of property that is being taxed or two?

A If we are referring —

Q Taxpayer.

A If we are referring to the taxpayer, we must clearly separate the fact that the banks, as such, are paying on their real property, in other words, if they have a particular lot and a block here in Dallas, and the School District, they are assessed a tax on that [134] real property in exactly the same manner that a non-bank property owner would be, that is the real property. The property that we are talking about here consists of an intangible personal property and as such, it is an assessment which is made to the shareholders of the particular bank.

• • •

[137] Q All right, so, so far as your records show, not one shareholder rendered to you the value of his shares.

A No, sir, I do not have a value of an individual shareholder rendering to us.

• • •

[138] Q All right, sir. Now, so, then, any federal securities that we may be talking about were not owned, as far as you know, by these shareholders.

A No, sir.

Q And in arriving at your value, your assessed value of the stock, did you even consider the value of federal securities that either the shareholder or the bank might own?

MR. YARBOROUGH: Objection, Your Honor, it calls for a conclusion of law which is the ultimate issue of the case.

THE COURT: It will be overruled.

THE WITNESS: No, sir.

• • •

[145] Q Okay, so, my question to you is unless there is some federal obligations contained in those capital accounts, you did not consider federal obligations in any respect?

MR. YARBOROUGH: Your Honor, we object on the same basis as our objection when Mr. Luna put it to the witness.

THE COURT: What?

MR. YARBOROUGH: We object, Your Honor, because it calls for a legal conclusion, which is the ultimate conclusion in this case.

THE COURT: Well, I think he can testify what he did, what he considered, what he didn't consider. Overruled. Go ahead. Re-ask your question.

MR. GRAHAM: Do you remember the question?

THE WITNESS: I did not consider the amount of any federal obligations in the process that I utilized to arrive at the assessed value of the bank and I would elaborate on that just a moment, if I may. That in the judgment of myself, as the assessor, the amount of federal obligations, [146] which were involved in a report of condition, was a factor which did not contribute to the value of the shares in any means, that it was a function of the management of the bank, which either chose to or chose not to place certain amounts of money in this form of a particular security, but it didn't have anything to do on the analysis that we performed to determine what the value of the shareholders' personal property was, so, what I object to them saying is, if you have two identical banks whose capital structures and whose market value of the shares were the same, we would have arrived at precisely the same value of the shares of stock, even though the federal amount of obligations that they had might have been markedly different, assuming that the real estate was the same, or you didn't take real estate into account.

• • •

[147] Q Mr. Noller, let me ask you a few questions. Would you pull out Exhibit 4, which I believe to be the rendition forms, to be furnished to you by certain of the banks? Do you have that before you, sir?

A Yes, sir, I do.

Q And I would like to ask you whether or not on certain of those forms the bank would render a rendition for real estate that in your connection, your [148] office, as looking at true value, you would change that value?

A Yes, sir, we would.

Q All right. Now, accordingly, that if the bank rendered real estate, just for an illustration, at $1,000, and your investigation determined to you that it had a true value of $3,000, you would change your assessment to three?

A Yes, sir.

Q All right. Now, we — and that happens, I take it, on several occasions?

A Yes, sir.

Q I believe you testified to one where it had been interlined through the rendition?

A Yes, sir.

Q Now, that is a direct tax on an asset owned by the bank.

A Yes, sir.

Q And the bill for that is rendered to the bank?

A Yes, sir.

Q Now, we have here what we are calling a tax on the shares of stock of that bank.

A Yes, sir.

Q And that tax, by law, is assessed to who?

[149] A The shareholders.

Q And the law, under Article 7166 requires who to render it?

A The shareholders.

Q All right. Now, how long has it been, Mr. Noller — I know you testified that you have been the director of revenue and taxation that we now call tax assessor and collector for the City of Dallas?

A Yes, sir, for over 11 years.

Q Over 11 years. During that entire 11 years, do you know of a single instance in which an individual shareholder of a bank rendered that stock to you for taxation?

A No, sir, I do not.

Q Now, in the event the person who is obligated to pay the tax fails to render, does the tax assessor have an obligation?

A Yes, sir, he does.

Q And what is that obligation?

A The obligation is based upon the rendition being made by the assessor and collector.

Q He must then assess?

A That's correct.

Q Now, Mr. Noller, there are several ways, are there not, of determining value?

[150] A Yes, sir.

Q Can you itemize the principal ways that one might go about to determine the value of a piece of property that you have to find a value for assessment of taxes?

A There are generally considered to be three primary ways of determining value. One of them would be from a cost approach.

Q All right. That would be if you could determine what it cost and when it was acquired and whether there had been any appreciation, whether that would be the proper or fair value?

A Yes, sir.

Q All right, sir.

A Another approach might be based on the income of a particular property, all things being equal, it may be that an investor is willing to pay a certain amount for the property based upon what kind of income or extreme it has.

Q What is the third?

A The cost approach, the income approach and the next one would be the market approach. What is the comparable property selling for within the framework of a particular arm's length transaction.

Q All right, sir. Now, Mr. Noller, applying [151] those principles to a tax on shareholders of banks, you really don't have any effort or any opportunity to use the cost approach, do you?

A That's correct.

Q And isn't that true, because you have no way of determining what that individual shareholder may have paid for it?

A That is correct.

Q Mr. Noller, the banks in Dallas County which you assess, those banks, would they generally fall in these categories in 1980, one, they are owned by a holding company?

A Yes, sir.

Q Such as First International Bancshares or Republic of Texas?

A Yes, sir.

Q Or others?

A Yes, sir.

Q And all of the stock, except the stock that is necessary by law to qualify those banks to have directors is owned by the holding company.

A Yes, sir.

Q And it is not traded, is it?

A No, sir.

Q And you don't know what they paid for it?

[152] A No, sir.

Q And you have no way of determining what they paid for it?

A No, sir.

Q Now, the second category, I take it, is banks at which the stock is very closely held by the founders or organizers of the bank that either got a state or national charter.

A Yes, sir, and frequently it has been said that the only way you can get stock like that is to inherit it.

Q Is to inherit it, and you have absolutely no way of determining what their cost is?

A No, sir.

Q And they don't render it.

A No, sir.

Q And you have a job or obligation by law to find its value.

A Yes, sir.

Q So we can eliminate, for that category, the cost approach.

A Yes, sir.

Q Now, the third type, of course, is those that might be over the open market. Some, I take it, are over the counter, I know of none on the big board, [153] but there could be some on the big board?

A Yes, sir, that's possible.

Q All right. Now, in view of the fact, Mr. Noller, that you have three different types of banks, is a tax assessor also faced with the problem of being fair and equal in the manner in which he determines the values for all categories?

A Yes, sir, equity is the name of the game.

Q And a tax assessor and collector, in spite of the fact that we all don't like to be taxed, you do apply principles of equity, do you not?

A Yes, sir.

Q And you try your best in a given category to determine the value of all of them on a equitable basis.

A Yes, sir.

Q All right. Now, since we cannot use the cost approach, I believe you next said was the income approach.

A Yes, sir.

Q Now, there has been some testimony here that perhaps certain of the banks render income statements, but you have no right or power to get their income statements, do you?

A No, sir.

[154] Q And the income statement is entirely different from what is published in the newspaper as a call statement, isn't it, sir?

A Yes, sir.

Q That doesn't have anything to do with income.

A No, sir.

Q And that is true as to whether it is a publicly-held bank or closely-held bank or a holding company bank?

A Yes, sir.

Q So, the income approach is not there for you.

A No, sir.

Q Now, that cuts you down to market value.

A Yes, sir.

Q Now, Mr. Noller, tell me whether or not, when you have to get ready to assess a value to an individual holder of bank shares, which the law says you must do, you then go after what you think is market value?

A Yes, sir.

Q And Article 7166 tells you that one of the ways and the most effective way to do that is to look at the equity capital of that individual bank?

A That is the technique that we use.

Q That is the technique that is used. Now, [155] Mr. Noller, I believe that you say you send out to the banks rendition forms and you ask them, because you are aware that these individual shareholders are not going to render, you have had at least 11 years experience, and prior to that, you were assistant, were you not, sir?

A Yes, sir.

Q And you know they are not going to render as the law requires them to do, so you ask the banks to send you what? Capital stock information?

A Yes, sir.

Q Undivided profits?

A Yes, sir.

Q And retained earnings?

A Yes, sir.

Q And if they have any reserves?

A Yes, sir.

Q Most of those come out zero, don't they, sir?

A Yes, sir.

Q You don't ever get many reserves listed, do you?

A Not a great deal.

Q That is what you ask them to render?

A Yes, sir.

Q You don't look at the assets or liabilities [156] at all, do you, sir?

A No, sir, I do not.

Q You do not, in your office, in going at it, add up the assets or subtract the liabilities and come out with the figure?

A No, sir.

Q Why, Mr. Noller, do you clip out of the newspaper the call statements? Is that to make certain that the individual bank who has sent you that information is sending you the correct information?

A It is a verification process.

Q It is a verification, and that is the only reason you clip it out of the newspaper, isn't it?

A That's correct.

Q All right. So, when you get down to it, that is the method that you have to use to tax it?

A Yes, sir.

Q All right, sir. Now, let me ask you, sir, if you did study an individual statement of a bank, and its assets showed $50,000 cash on deposit and next it showed federal obligations, $25,000, and next it showed real estate, $100,000, would it affect what you are doing at all, if another bank or that same bank, instead of showing federal deposit or federal securities, had it all in cash?

[157] A No, it would not affect it.

Q It wouldn't affect it a bit, would it, sir?

A No, it would not.

Q You are not taxing federal obligations in your approach, are you?

A Not in my opinion.

Q And you then used that approach and on that approach, you render, you assess and based upon that assessment, a tax is rendered to each of these shareholders.

A Yes, sir.

Q Now, Mr. Noller, I would like to clarify one other thing. I notice that your statements are sent to the bank instead of to the individual shareholders.

A That is correct.

Q Tell me whether or not that comes about as a request of the bank.

A Yes.

Q You would be happy, although it would be more expensive to send, they ask you to send it to them, do they not?

A Yes, that is correct.

Q And is it also true that in many instances where you're taxing real estate, the mortgage company that holds the mortgage says, "Send that tax statement [158] to us"?

A Yes, in scores of thousands of cases.

Q That does not affect, does it, Mr. Noller, who owes the tax?

A Not in the slightest.

Q And you simply accommodate people who ask you to do it as a public service.

A Yes, sir.

• • •

[159] Q Let's suppose that transaction number two, on January 2, 1980, was that the bank decided to buy a $100,000 United States obligation.

A Yes, sir.

Q Would — and that transaction was completed. Would the completion of that transaction change either [160] the total assets or the total liabilities of the bank?

A In my judgment, it would not.

Q It would change the form of one asset, of course?

A Yes, sir.

Q From money to a federal security?

A Yes, sir.

Q Would that transaction have any effect, buying that federal security, would it have any effect on the amount of the capital structure that we have called equity capital?

A No, it would not.

Q So, when a bank buys federal securities, it doesn't affect the capital structure?

A No, it does not.

• • •

Q Mr. Noller, I have a few more questions. I am getting a little bit confused by your testimony and I'm sure it is my fault and not yours, but I understood your testimony earlier to be that in most of the stock in these banks was rendered by the bank, the stockholders, I understand, did not send you rendition forms, but the [161] banks did it on behalf of their stockholders, is that correct?

A I am not sure that I can tell you the relationship that exists between the bank and their shareholders with reference to the furnishing of the information to us.

Q All right, fine.

A But the information is furnished to us by presumably, usually, some officer or a vice president or a chief cashier of the bank, it is signed by that individual.

Q Fine. You testified earlier that you send the statements to the bank, you have in the past years, you send the tax statement to the bank and you said that was at the bank's request?

A Yes, or it would be at the request, in some instances, the bank's rendition form may be furnished to us by a third party, and under those circumstances, it may be that that party would request that the statement be furnished to them. I presume, for the purpose of insuring that

the numbers are correct and then I suppose they are forwarded on for payment by whoever is going to make that payment.

Q How do the banks that is in this lawsuit that are in your taxing jurisdiction request that you send [162] the statement and the rendition form to the bank? Let me withdraw that question and back up a second. Would a request from a bank be made prior to your sending the rendition forms out? Would a request of where anything gets sent be made prior to your sending the rendition form out in the first week or two of January as you earlier testified?

A It would not be as a general proposition on an annual basis, but it would have been initially in each of the banks to start with and as I say, initially, someone at the bank would have been contacted when the bank opened up and became subject to taxation the first time and we would try to determine who at that bank and how do you want it to be mailed and that information would have been furnished to us from someone in the bank initially. That probably continues, then, from year to year, the same, unless there is some reason why the post office box or mailing address may be subject to a change but I believe the input originally came from the bank at some time in the past.

Q Fine. When the banks fill out this rendition form and send it back to you, do you consider that a rendition of the stock of the bank? Do you then — let me rephrase the question. Do you consider that rendition form as being the rendition of the stock of the bank, [163] just as if each shareholder had rendered that information?

A I do not consider that that rendition form meets the requirements of the statute with reference to the way that the renditions should have been made. However, for pur-

poses of administering the assessment, we are willing to accept that information from the bank.

Q And you did so, if there is a rendition form in our earlier exhibit of rendition?

A Yes, sir.

Q On Plaintiffs' Exhibit 6, which is the call statement for Brookhollow National Bank, under assets, there is an entry for bank premises, is that correct? Read that entire entry for me.

A The line says, "bank premises, furniture and fixtures and other assets representing bank premises, $913,000".

Q Now, that $913,000 figure does not represent the assessed value of the real estate, is that correct?

A That's correct.

Q But the real estate of the bank would be at least in part included in that entry?

A Yes, sir.

Q That is one of the assets of the bank?

A Yes, sir.

[164] Q But you deduct that from the equity capital, is that correct?

A That's correct.

Q And you testified earlier that you make that deduction to prevent the same property from getting on the tax rolls twice.

A Yes, sir.

Q To prevent double taxation of the same property?

A Yes, sir.

Q So if a bank took all their U. S. Treasury securities and the purchased real estate, their share stock tax would be decreased?

A If the bank had part of its assets in a form of real estate, which according to the statute is entitled to be deducted, then in fact it would be deducted.

• • •

[166] Q Mr. Noller, are you familiar with the provisions of Article 7165?

A I have read 7165, yes, sir.

Q Okay. Under those provisions, do the banks send you a list of the shareholders and their addresses and the number of shares that they hold in the bank?

A Some do and some do not.

Q Okay, if a bank does send you a list of shareholders, with the addresses and the number of shares, do you send those individual shareholders the statements for the taxes of their pro rata part of the bank stock?

A No, sir, we have not, on the 1980 roll done that in any case.

[167] Q Have you ever done that?

A No, sir.

• • •

(Excerpts from the testimony of Respondent Joy B. Montgomery, tax assessor collector for Respondent Town of Highland Park)

[180] Q How did you arrive at the assessed value of Park Cities Bank stock for 1980?

A I used the shareholders' equity that was on the statement of condition that was presented to me by the bank.

Q The bank sent you a statement of condition?

A Yes.

Q They did? Did you request that statement of condition?

A No, I did not.

Q They just sent it to you?

A Yes.

Q Voluntarily?

A Yes.

Q And what did you do with it — I believe you said equity capital on the statement?

A For the shareholders.

Q Shareholders' equity?

A Uh-huh.

Q May I see a copy of the statement of condition that they sent you?

[181] A Sure. (Witness hands document to counsel.)

Q There is a column "Assets, liabilities and shareholder equity", and you took the amount from shareholders' equity?

A That's right.

Q Did you make any deductions from that amount?

A Their real estate was deducted.

Q Was that the assessed value of their real estate?

A Their real estate — yes, the assessed value was deducted after the assessment was figured on their personal property.

• • •

[182] Q Did you deduct any amount for United States [183] obligations?

A No.

Q For any Treasury bills?

A No.

Q For any obligations of other U.S. Government agencies or corporations?

A No.

Q You did not deduct the amount of any stocks, bonds, Treasury notes or other obligations of the United States or the interest thereon?

A No, I didn't.

• • •

[198] Q Now, as an experienced tax assessor and collector, once you determine the book value of the stock of Park Cities Bank and Trust Company, you had done that without any regard whatsoever for federal obligations?

[199] A That's true.

Q And you were not taxing federal obligations as a tax assessor, were you?

A Not to my knowledge.

• • •

[203] Q Wonderful. Now, Page 2 of that letter, it has, under the heading, "Taxable value of the capital stock as of January 1, 1980", is that correct?

A Yes.

Q And then it has some deductions from the assessed value prior to any formulas being made, it has real estate and then it also has U. S. Government securities owned. Did you deduct the amount of the [204] U. S. securities

owned as shown in this letter at any stage of this formulation?

A No.

Q You made no deductions for United States securities?

A No.

• • •

(Excerpts from the testimony of respondent N. G. Johnson, tax assessor-collector for respondent Richardson Independent School District)

[209] Q How did you compute the value of these bank stocks for taxation?

A I take the capital structure —

Q Excuse me, how did you in 1980?

A I took the capital structure —

Q Could you explain that a little bit?

A Yes, sir, okay, I took the capital stock, the surplus and the undivided profits and added those three together. Okay, we take, in Richardson School District, we assess on 100 percent. Okay, from this, we took the real estate from it and from that balance, we assessed it on that. In other words, if it was a million dollars and the real estate was 500,000, we subtracted the 500,000 from the million, left 500,000 to be assessed as the stockholders' share.

Q When you — you listed three items, capital, surplus, undivided profits. Is that equity capital?

A That is the bank shares.

Q Is it?

A Yes, sir.

• • •

[210] Q So you take the equity capital and you deduct the assessed value of the real estate and the remainder is the assessed value of the bank stock?

A That's correct.

Q In all of these banks, they deducted an amount for U. S. obligations. Did you honor that deduction?

A No, I did not.

Q You made no deduction at any point in your calculations for United States obligations or agency obligations owned by the bank?

A No, sir.

• • •

[224] Q You sent the statement to the bank, I take it, for two reasons: one, because they didn't furnish you with a list of shareholders.

A That's correct.

Q And two, I assume that in the past they had asked you to do so.

A They had not asked me, but they had prior to my taking office.

Q The records in your office indicated they had requested it prior to that time?

A That's correct.

Q Now, you never at any time, did you, Mr. Johnson, in coming up with a value of the shares of [225] stock, of any of the four banks that you were taxing, add up the assets and subtract the liabilities. What you did was look at capital structure?

A That's correct.

Q Book value.

A Yes, sir.

Q You didn't pay any attention to the assets except the real estate?

A That's correct.

Q And you were not taxing any federal obligations in your opinion, as a tax assessor, were you?

A No, sir, I was not.

Q You were taxing a value of a share of stock that a stockholder and/or the bank that the stock is in refused to give you the valuation thereof?

A That's correct.

Q And you used the only value approach to discharge your duty?

A That's correct.

Q And in doing so, it is your opinion that you did not at all tax any federal obligations, what you did was to get a value of a share of stock?

A That's correct.

• • •

[228] Q Looking at Plaintiffs' Exhibit 17, which you testified were copies of the tax bills, who were they addressed to?

A Okay, White Rock National Bank of Dallas.

Q Okay. Let's stop right there. Does it say anything on there about shareholders of White Rock National Bank?

A No, sir.

Q Do any of them?

A No, sir.

Q And that is addressed to the bank?

A Yes, sir.

Q And that is a tax bill?

A That is a tax bill.

• • •

[231] Q Why did you send the tax statement to the banks as opposed to the stockholders?

A I had no other place to send it, sir, I did not know the stockholders.

Q Have you had any kind of a standing practice with respect to personal property tax statements to bank shares?

A You mean in previous years?

Q Yes, sir.

A Yes, sir, we have always sent it to the bank, sir.

Q Has that been the way that the banks have wanted it?

A Yes, sir.

• • •

(Excerpts from the testimony of respondent J. W. Walls, tax assessor-collector for respondent Garland Independent School District)

[235] Q In what manner did you value the stock of these six banks for taxation?

A I took the total capital structure and [236] subtracted the appraised value for the real estate to arrive at the total appraised value for fair market value for personal property stock.

• • •

Q Fine. You said you took the capital structure and deducted the appraised value of the real estate.

A Yes, sir.

Q What is the capital structure, what do you mean by capital structure?

A The capital stock, surplus and undivided profits.

Q Is that equity capital?

A Same thing as equity capital.

[237] Q Did any of these banks in either on their rendition form or the letters accompanying the rendition form in Plaintiffs' Exhibit 19, deduct any amount for U. S. Treasury securities or obligations of other United States Government agencies or corporations?

A They deducted them.

Q They deducted them?

A Right.

Q What did they deduct them from?

A They deducted it from the total equity account.

Q They have a number there that they deducted?

[238] A Yes.

Q Did you honor that deduction?

A No, sir.

Q You ignored it?

A That's right.

• • •

Q Did you not use their numbers at all?

A No, sir, I used the call statement I clipped [239] out of the newspaper.

Q I see, so you just relied, even though they rendered to you, you relied entirely on the call statement?

A I verified the call statement to the numbers that they had submitted as capital and surplus and undivided profits.

Q And everything matched?

A They matched.

• • •

[241] Q At any stage during your computation of the tax, did you make any deduction for any United States obligations or agency obligations or any federal obligations?

A No, sir.

• • •

[244] Q Now, was there any other property that was owned by the bank that was taxed other than that real estate that you have just told us about in that amount?

A No, sir.

Q Did you tax any federal securities owned by the bank?

A No, sir.

• • •

[245] Q Now, is that — are we talking about apples and oranges? In other words, are there any federal securities in capital account or is that some other place on the statement?

A As far as I know, it is on another location on the statement in assets. However, this bank did not even show federal assets.

Q They didn't show any amount?

A They only gave me four — five numbers.

Q So, in arriving at the 100-percent market value of that stock, before you applied the 60 percent, before you subtracted the real estate, did you take into consideration

in any way in arriving at that figure the amount, in arriving at that figure for the stockholders' property, the amount of federal securities that the bank owned?

[246] A No, sir.

• • •

[255] Q Did — in the case of any of those six banks, did anybody, stockholder, bank or anybody else, ever send you any rendition to tell you what they contended the value of the stock in either of the banks was?

A. No, sir.

Q And not one of the six even gave you a list of stockholders?

A No, sir.

• • •

[257] Q Have you sent the tax bills to these banks?

A Yes, sir.

Q Who were the bills addressed to?

A The bills were addressed to the bank. We [258] should have had them — the word "shareholders" on the end.

Q I just asked you who was the bill addressed to.

A Well, I —

Q How was it addressed?

A The bills was addressed to the bank.

• • •

(Excerpts from the testimony of Respondent Thomas B. Landrum, tax assessor-collector for respondent City of Garland)

[286] Q Do you have a statement of condition in your file for each bank?

A We have copies of the newspapers for the ones we did not receive from one.

Q Do you use the call statement in the computing of the taxes?

A Yes, we use a portion of it.

• • •

[293] Q Could you please explain the method you used to assess the bank stock for taxation?

A Yes, sir. We take the capital surplus and undivided profits, we take 50 percent of that figure because we assess on a ratio of 50 percent, then we subtract the real estate, which has been appraised and assessed, and the remainder being personal property to the shareholders.

Q Would you list for me again the first three items that you add together before you start applying this formula?

A The capital, surplus and undivided profit and then any reserve contingencies.

Q Is that equity capital?

A Yes.

Q Do you make any other deduction at any stage in the formulation for U. S. Treasury securities or other obligations of the U. S. Government or its agencies or corporations?

A None.

• • •

[294] Q Have you sent the bill, the tax bill, out [295] for this stock tax?

A Yes, sir.

Q Where did you send the bills?

A In the month of September we mail them to each bank, due to the fact that they are acting agents for the shareholders.

Q One more question, I just want to clarify something. The formula that you gave us for computing the tax that began with equity capital, then you applied a —

A Fifty percent.

Q Fifty percent to it, then you deducted the assessed value of the real estate.

A That's correct.

Q And then the balance you applied the tax rate to?

A That's correct.

Q And at no time did you ever deduct any United States obligations or make any other deductions?

A No, sir.

• • •

[298] Q Okay. Now, Mr. Landrum, once you do that, do you consider any U. S. obligations at all in that computation?

A No, sir.

Q Are they even relevant, in your opinion?

A No, sir.

• • •

[304] Q In any of your transactions in appraising the stock in either of these banks, Mr. Landrum, did you take into consideration in any way the amount of federal securities owned by any bank?

A No, sir.

• • •

(Excerpts from the testimony of Respondent John Childs, tax assessor-collector for respondent Dallas County).

[308] Q Do you or someone in your office assess the bank stock for banks located in Dallas County for ad valorem taxation?

A In my office, someone in my office.

Q Did they do so in 1980?

A That's correct.

Q Who was it that assessed the bank stock in your office for the year 1980?

A Mr. Emmett Frier.

Q He actually went through all the computations?

A That's correct.

Q So he would be the one to ask if we had any questions about how the tax was computed?

A That's correct.

• • •

[309] Q Mr. Childs, did your office assess any property owned by any bank except real estate?

A No, sir.

• • •

(Excerpts from the testimony of Emmett Frier)

[316] Q Please state your name for the record.

A Emmett Frier.

Q Mr. Frier, how were you employed during the year 1980?

[317] A I was employed by the Dallas County Tax Office.

Q And in what capacity?

A As a supervisor of personal property tax section.

• • •

[322] Q In assessing the stock of these banks, do you use a call statement?

A Do I use the call statement?

Q Yes, well, let me ask, do you know what a call statement is?

A Yes, sir.

Q Do you use a call statement in assessing the stock in these cases?

A I use a certain portion of the call statement if I have no other information.

• • •

[325] Q Thank you. Now, all the tax assessor/collectors that have testified in this case so far have testified that they assess the value of the bank stock by taking equity capital and deducting the assessed value of the real estate to determine the total value of the bank stock for taxation and they made no deductions for any federal obligations or U. S. obligations owned by the bank. Is that how you computed the tax for these banks in 1980?

A Yes, sir.

Q In 1979, you did the same thing?

A Yes, sir.

Q And that would be true for all of these banks?

A Yes, sir.

Q You made no deductions for any United States obligations owned by the bank?

A No, sir.

Q And if on a rendition form a bank had shown a deduction from their equity capital for United States obligations, did you honor that deduction?

A If they had turned it in on that statement I sent them to ask them for their capital structure, [326] they had deducted the obligations, I would have ignored their deductions.

Q You would have ignored the deduction of United States obligations?

A Yes, sir.

• • •

[327] Q Did the stockholders in any — any stockholder in any bank in Dallas County render to you what they said was the actual value of the corporate — of the bank stock that that particular stockholder owned?

[328] A No, sir.

• • •

[330] Q Now, no one, as Mr. Luna has had to — has elicited from you, neither the holding companies who own stock for the banks nor any individual shareholders of any of these banks told you the value of that stock?

A No, sir.

Q Now, when you do not have the value, and you have a duty at law to assess and tax a share of bank stock, do you also have the duty to do your best under recognized principles to determine the value of the property that you must assess?

[331] A Yes, sir.

Q And there are standard principles, are there not, Mr. Frier, by which one goes about that?

A Yes, sir.

Q Is there one standard principle that is used to appraise property known as the cost approach?

A Yes, sir.

Q Did you have any information or did you have access to any information as to the cost that these stockholders, whomever they may have been, paid for their stock?

A No, sir.

Q Did you have any resource to get that information?

A No, sir.

Q Accordingly, then, I take it you could not use the cost approach, is that correct?

A That's correct.

Q Now, I understand that there is another established principle by which one — that is utilized by one to determine a value and that is income approach.

A Yes, sir.

Q Did you have any information by which you could determine the income that the shareholders got from their stock?

[332] A Yes, sir.

Q Did you have any information by which you could determine the income that the shareholders got from their stock?

A No, sir.

Q Did you have access to that information?

A No, sir.

Q Was there a public record of any type that you could have searched out?

A No, sir.

Q So I take it you could not use income.

A That's correct.

Q Now, Mr. Frier, in your 15 years experience, how much of that 15 years have you spent in connection with assessing business personal property such as shares of bank stock?

A Seven years.

Q Seven years.

A Yes, sir.

Q During that seven-year period, can you think of any instance where any shareholder of that stock has rendered to you and said "my stock is worth X dollars"?

A No, sir.

Q As a matter of fact, not one time has that [333] occurred, has it?

A No, sir.

Q Now, from that experience, were you aware of the fact that you were going to have to come up with something to determine properly and assess the value?

A Yes, sir.

Q Is that why you asked for capital structure?

A Yes, sir.

• • •

[335] Q Now, that, then, gave you the only basis that you had to do what, come up with a value of the stock?

A Come up with a fair market value of the stock.

[336] Q Fine, sir. Did you have any other approach that is recognized that you know of in all of your experience to come up with?

A No, sir.

• • •

Q Who owe the tax?

[337] A The stockholder.

Q The stockholder owes the tax, didn't they?

A Yes, sir.

Q To your knowledge, in 15 years experience, Mr. Frier, has Dallas County ever taxed a bank for anything except the real estate that it owned?

A No, sir.

• • •

[353] A Would you like to rephrase that question?

Q Yes, sir, I should, it was a very awkward question. The only thing that the banks were taxed for was the real estate?

A That's correct.

Q The matter we are discussing here today was a tax to who?

A The shareholders.

Q And it was taxing what?

A Their shares of stock.

Q Mr. Frier, you're entitled to testify on this question. Do you have an opinion after 15 years and seven, if my memory is correct, of handling business personal property which includes the tax here, did you tax anybody for federal obligations?

A No, sir.

• • •

[357] MR. COFFEE: Yes, Your Honor, I am Roy Coffee and I represent Canyon Creek Bank and this is H. Louis Nichols who represents the City of Richardson and we have entered into the written stipulation and we would like to read it to the Jury and leave a copy with the Court.

The stipulation between the City of Richardson and Canyon Creek National Bank, it is agreed that, one, the consolidated report of condition marked Canyon Creek Number 1 be admitted into evidence and that said document truly and accurately reflects the matters set forth therein.

Two, the Canyon Creek National Bank investment securities list, marked Canyon Creek Number 2, be admitted into evidence [358] and that said document truly and accurately reflects the matters set forth therein.

Number three, the method used by the City of Richardson in assessing the bank stock in the Canyon Creek National Bank in the tax year 1980 was to take the total equity capital of said bank, Line 30 on Canyon Creek Number 1, and then subtract from that figure the assessed value of all real estate owned by the said bank, the resulting figure was then used on the assessed value of the stock of said bank. The tax assessor did not subtract obligations of the United States Government owned by said bank in his calculation of the aforesaid assessed value.

• • •

(Excerpts from the testimony of Ernest R. Richardson, tax assessor-collector for respondent Highland Park Independent School District)

[363] Q Let me complete my question. Do you use a call statement or any portion of it in determining the value of these bank stocks for taxation?

A Yes, I do.

Q Do you have a call statement for each one of these banks in your file?

A I have a statement of conditions, it is not an actual call statement that has been rendered to the Banking Commission, but I do have a statement for both banks.

• • •

[364] Q Did they deduct that from — strike that question.

Did you compute the value of each of these bank stocks based on equity capital less the assets value of real estate without taking any deductions for United States obligations owned by the bank?

A Yes, sir, I did.

• • •

[366] Q (By Mr. Lidji) In both of these banks, the [367] value of the bank stock for taxation purposes was computed, was it not, based on equity capital less assessed value of real estate without any additional deductions for any United States obligations owned by the bank?

A That's correct.

• • •

[373] Q And Mr. Richardson, as an experienced tax assessor and collector, did you tax anybody for federal obligations?

A No, sir.

• • •

[378] Q In the number of years that you have been involved in assessing and the collecting of taxes, it has been a part of your business to know how to appraise property of different types, hasn't it?

A Yes, sir.

Q Including bank shares?

A Yes, sir.

Q And have you found it to be a usual and customary and accepted practice to use the equity capital in arriving, as you have done here, in arriving at the actual value of the stock certificates in total?

A Yes, sir.

• • •

[380] Q In the past, Park Cities Bank had always been sent the bill for the tax and had they also paid it?

A It was my knowledge they did.

Q Okay. So, really, this first sentence, where it says "We hereby render the total value of capital stock in Park Cities Bank" is really the rendition of the stock which the bank is doing for its shareholders?

A I would assume so, yes, sir.

• • •

(The following excerpts from the testimony that are in quotations were read to the jury from a deposition.)

[382] "Question. Would you state your name for me, please?

"Answer. Paula Conley.

"Question. And what bank are you associated with?

[383] "Answer. Dallas National Bank in Dallas.

"Question. What is your position with Dallas National Bank?

"Answer. Assistant vice-president."

• • •

[384] MR. LUNA: "Question. Okay. Mrs. Conley, how does Dallas National Bank go about acquiring an agency obligation of the United States Government or another type of government obligation?

"Answer. It's determined by our management what we are going to acquire, and then the president of the bank handles [385] it through an agent at Republic National Bank.

"Question. After your bank has purchased a federal obligation, what are the bookkeeping entries that you make, or your bank makes?

"Answer. Okay. An, a debit entry is made to the U. S. or agency account and the credit is on the due from or cash account of the bank.

"Question. Are those both asset accounts?

"Answer. Yes.

"Question. Is it possible to determine whether or not the funds used to purchase such a federal obligation come from capital or from deposits?

"Answer. They would come out of the cash account, not necessarily — they wouldn't come off the capital structure.

"Question. So they would have nothing to do with either the liability part of the balance sheet —

"Answer. No.

"Question. — or the equity part of [386] the balance sheet, equity capital?

"Answer. No."

• • •

(Excerpts from testimony of Paul Valenta, an officer of petitioner Inwood National Bank)

[404] Q So, then, if we purchase a federal security, at the time that federal security is purchased, it will have no effect on the capital, equity capital figure of the bank, will it?

A That's correct.

• • •

(Excerpts from the testimony of Richard L. Park)

[412] Q Mr. Park, would you state your full name, please?

A Richard L. Park.

• • •

[413] Q By whom are you employed at the time?

A First National Bank in Dallas.

• • •

[415] Q Will you tell the Jury, please, generally, what is a call statement of a bank?

A A call statement is a report of condition of the bank as of a given date, together with a report on its operations for the period ending on that date and then such other supplementary information as the regulatory authorities may request.

Q Mr. Park, is a part of the call statement of a bank a statement of condition?

A Yes, it is.

Q And is that sort of the same thing as a balance sheet?

A Yes, sir, it is.

• • •

[417] Q What categories, general categories of items appear on a call statement, on the statement of condition portion of the call statement?

A A listing of the assets, a listing of the liabilities and the equity capital.

Q Are all the assets of the bank supposed to be listed in the asset portion of the statement of condition?

A Yes.

Q And are all the liabilities of the bank required by applicable regulations to be listed on that statement of condition?

A Yes, they are.

• • •

[420] Q As a matter of accounting for banks, is there a formula by which you can state what equity capital is or how you would find out what equity capital is?

A You could state that it is the excess of the assets over liabilities.

Q Total asset value, then subtract the total liabilities, is that what you are saying?

A Yes, sir.

Q It would tell you what equity capital is?

A Yes, sir.

• • •

[421] Q Now, what, of these assets, the assets of the bank, are included in the computation which leads you to find out what the equity capital is? Which of these assets are included in that equity capital?

A All of the assets would be included.

• • •

[422] Q (By Mr. Yarborough) Is there any asset of a bank that would not be considered, in determining what is equity capital is?

A No, sir, there are no assets.

• • •

[425] Q All right. Now, when we said here that a $400 asset bank, if we, to use this same hypothetical situation, would have an equity capital of $100, if the liabilities are 300. Now, which one, if any, of those assets are down here in equity capital?

A Equity capital does not represent specific assets.

• • •

[426] Q So, then, the equity capital account is simply a figure that represents, as you have told us, the stockholders' claim on the entire corporation.

A That is correct.

Q And as you pointed out, it has — it doesn't have any federal securities in it, does it, because it doesn't have any single asset, any asset of any type in it, it is a claim?

A It is a liability account.

Q It is a liability account. Now, what are federal securities? They are assets, aren't they?

A Yes, sir, they are.

Q So, if the equity capital account is a liability account, there aren't any assets in it, is there?

A There are no specific assets in that liability account.

• • •

[433] Q Now, as the bank operates, and if we take $10 of that cash and buy a federal bond, out of $10 of that cash, does that have any effect on the amount of the net assets?

A It has no effect on the amount of the net assets.

Q Does it have any effect on the amount of the liabilities?

A No effect on the amount of liability.

Q And when we bought that federal bond, does it have any effect on the equity capital? It doesn't change it a bit.

A It doesn't change it.

Q All right, so, as we buy bonds, or whatever U. S. obligations are, it does not in any way change the capital account?

A It does not change the capital account.

• • •

[437] Q Mr. Park, I am Dick Gray, I don't think we have met before, sir. I would like to ask you — let me approach you as regarding this illustration. I believe you testified that the equity capital, among other things, represents the claims of the shareholders on the bank.

A On the assets of the bank.

Q On the assets of the bank. I wish you would assume with me, sir, that this hypothetical bank, I own 10 shares. What do I have? A piece of paper known as a stock certificate for 10 shares?

A Yes, sir.

Q Now, can I walk into the bank tomorrow morning and say, "Here is my certificate, and I want my pro rata share of these assets. Give them to me"?

A No, sir, you cannot do that.

• • •

[438] Q Fine, sir. Now, who owns, in this hypothetical illustration, these assets, the bank?

A The assets are carried in the name of the bank.

Q They, and I recognize these are very small numbers, but they are all owned by the bank, aren't they?

A That's correct.

Q Now, who owns that 10 shares of stock I'm talking about, the stockholder?

A The stockholder.

• • •

[443] Q In your opinion, Mr. Park, can you look at a statement of condition, a balance sheet of a bank or any other company and just look at the assets or just look at the liabilities or just look at the equity capital and ignore everything else?

A No, sir, you have to look at it, the total financial statement, the total financial condition.

Q Is there a relationship between the equity capital account and the assets and liabilities account?

[444] A Very definitely.

Q What is that relationship?

A The equity capital represents the excess of the assets over liabilities.

• • •

[446] Q But insofar as assets, assets of the bank, with the exception of cash, and I recognize what you're saying about loans, but basically, assets are never at the true definitive value, are they, sir?

A When you say — I don't know what you mean by "true definitive value", they are recorded on the books at historical cost.

Q Historical cost, but I guess maybe I should ask my question this way, Mr. Park: Any asset except cash, cash

is cash, I think we can all agree on that, but almost every other asset that you have at a value on your books, and you say historically at cost, you really don't know what it's worth, do you?

A I don't know what it's worth.

Q It would take somebody that is willing to buy it and pay for it, that would be its true value, wouldn't it, sir?

A Its true value would be established when it was converted to cash.

• • •

(The following excerpts from the testimony that are in quotes were read to the jury from depositions.)

[519] "Question: Would you state your name for the record, please?

"Answer: Ronald A. Bacon.

"Question: What bank are you associated with, Mr. Bacon?

"Answer: National Bank of Commerce of Dallas.

"Question: And what is your position in that bank?

"Answer: I am senior vice-president — controller and cashier.

• • •

[522] "Question: All right. Mr. Bacon, when the National Bank of Commerce acquires a government security, what are the bookkeeping entries?

"Answer: We debit the balance sheet account for U. S. Treasury securities, for example, and credit cash.

"Question: All right. Are those both asset accounts?

"Answer: Uh-huh.

"Question: Is there any way to determine where the funds used to purchase federal obligations come from, either from deposits or from capital?

[523] "Answer: Not really.

• • •

[530] "Question: Would you state your name for me, please?

"Answer: Paula Conley.

"Question: And what bank are you associated with?

"Answer: Dallas National Bank in Dallas.

• • •

[533] "Question: After your bank has purchased a federal obligation, what are the bookkeeping entries that you make, or your bank makes?

"Answer: Okay. An, a debit entry is made to the U. S. or agency account and the credit is on the due from or cash account of the bank.

"Question: Are those both asset accounts?

[534] "Answer: Yes.

"Question: Is it possible to determine whether or not the funds used to purchase such a federal obligation come from capital or from deposits?

"Answer: They would come out of the cash account, not necessarily — they wouldn't come off the capital structure.

"Question: So they would have nothing to do with either the liability part of the balance sheet —

"Answer: No.

"Question: — or the equity part of the balance sheet, equity capital?

"Answer: No."

• • •

[603] "Question: Would you state your name for the record, please?

"Answer: Richard Park.

"Question: And what bank are you associated with?

"Answer: First National Bank of Dallas.

• • •

[609] "Question: (By Ms. Fletcher) When First National Bank acquires a federal obligation, is it possible to determine whether the funds used to purchase that obligation comes from either the capital account or from depositors' money?

"Answer: No."

• • •

[610] "Question: Would you state your full name for the record, please?

"Answer: Thomas James Pruitt.

"Question: What bank are you associated with, Mr. Pruitt?

"Answer: Mercantile National Bank at Dallas.

• • •

[617] "Question: Okay. My question is: We'll just look at Exhibit No. 7; when you purchase a Federal obligation can you trace the money used to purchase that obligation either to deposits or some kind of deposit account, or to your capital, or is that [618] something that you can't trace?

"Answer: That's two questions.

"Question: Can you trace it to your deposits?

"Answer: No.

"Question: Can you trace it to your capital?

"Answer: No.

• • •

[689] "Question: Would you just state your name for the record, please?

"Answer: Dan Shelton.

"Question: What bank are you employed with?

"Answer: Republic National Bank of Dallas.

• • •

[695] "Question: Can you trace the source of the funds used to purchase Federal obligations from either your capital or from the deposits?

"Answer: No.

• • •

OUT OF THE PRESENCE AND HEARING OF THE JURY:

[771] THE COURT: Okay. Anything further? Well, I'm still going to rule it is inadmissible as far as the question in this case to the method used; so, go ahead with your bill.

MR. LUNA: All right, sir.

JOHN HYZER,

called as a witness in behalf of the Defendant Dallas County, for the purposes of a Bill of Exception, being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

[772] Q Would you state your name to the Court, please, sir?

A Yes, sir. John Hyzer, also known as Jack.

Q Mr. Hyzer, would you tell us, by whom you are employed at the present time, I would like to start with your present employment and go backwards, please.

A I am a vice president and Rauscher, Pierce, Refsnes, Incorporated, in Dallas.

• • •

[779] Q (By Mr. Luna) Mr. Hyzer, at the request of representatives of Dallas County and the City of Dallas and Dallas Independent School District, would you tell us whether or not you have made a study and analysis of the various values of corporate stock of banks in the City of Dallas and Dallas County?

A Yes, sir, we attempted to ascertain what, in our opinion, the market value of about 50 banks in **[780]** the Dallas County area would have been on January 1, 1980.

• • •

OUT OF THE PRESENCE AND HEARING OF THE JURY:

A The first step was to ascertain how many of those banks, if any, had a representative public quote for its stock price on that day and we found four independent banks that we thought had a quote that we would consider to be representative of a true market value on that day. Actually, the day would be December 31st, 1979. The four banks were Dallas International Bank, Lakewood Bank and Trust, Oak Cliff Bank and Preston State Bank.

• • •

Q Let me hand you first what has been marked for identification purposes as Defendants' Exhibit Number 12 and ask you to identify that for us, if you will, please, sir.

A Yes, that is certain information on the [781] four publicly quoted bank stocks that I mentioned.

• • •

Q Now, with respect to the actual sales price on December 31, 1979, and January 1, 1980, what did you find that to be?

A Dallas International, we found a stock price of approximately $6.60 per share.

Q All right. Now, in the case of that bank, [782] was that more or less than book value?

A It was substantially less than book value, book value was approximately $10.03, so the stock price was quoted at about 65 percent of book value.

Q And the Lakewood Bank, was that one of them that you also considered?

A Yes, sir.

Q Now—

OUT OF THE PRESENCE AND HEARING OF THE JURY:

A Lakewood Bank was selling at a substantial premium to book value.

Q All right. Go ahead and tell us about Lakewood.

A The stock price that we found was approximately $14 per share and the book value per share was approximately $8.50 per share so that the Lakewood stock was priced at about 165 percent of book value.

Q And what is the approximate amount of deposits in that bank?

A One hundred and ninety-six million.

Q Now, the Oak Cliff Bank, what did you find with respect to that bank?

A Oak Cliff we found was selling at 144 percent, approximately, of book value. Book value was $18.09 per share, approximately, and the stock price [783] was approximately $26 per share.

Q All right, sir. How about the Preston State Bank?

A Preston State, we found a stock price approximating $10.25 per share, a book value of $8.90 per share, for a premium of 15 percent, the stock was 115 percent of book value.

• • •

Q (By Mr. Luna) I'm going to hand you what has been marked for identification purposes as Defendants' Exhibit Number 13 and ask you to tell us what that is, please, sir.

A That is a listing of other independent banks in and around the Dallas area which you asked us to value and selected information on those banks, the [784] bank stocks.

• • •

OUT OF THE PRESENCE AND HEARING OF THE JURY:

[785] A We would think that if NorthPark National were a publicly traded stock that it would be valued at about 203 percent of book value.

Q What was book value of NorthPark?

A Book value was $14.88, approximately, and in our opinion, we would think that the trading price would approximate $25.30 per share.

Q All right, sir, and the Bank of Dallas?

A Bank of Dallas —

Q Each of these cases I am asking you to give me your opinion, you understand that?

A Yes, uh-huh. The Bank of Dallas, we valued at approximately 150 percent of book, do you want me to read the numbers in each case?

[786] Q Yes, sir.

A Book value was $15.15 per share and in our opinion, the trading market would have been $22.75 per share.

Q All right, sir. The First Citizens Bank?

A First Citizens we placed a value of 132 percent of book value, book value was $51.13, trading market estimate was $67.50 per share.

Q Grand Avenue Bank?

A Grand Avenue, we valued at 120 percent of book value, book value was $23.68 per share and the trading market estimate was $28.50 per share.

Q Valley View Bank?

OUT OF THE PRESENCE AND HEARING OF THE JURY:

A Valley View we placed a value of 180 percent of book. Book value was $13.90 per share, our trading market opinion was $25 per share.

Q All right. The Bank of Texas?

A Bank of Texas we valued at 120 percent of book, book value was $6.03 per share and our trading market opinion, 7.25.

Q Seven dollars and twenty-five cents?

A Seven dollars and twenty-five cents.

Q Brookhollow National Bank?

A Brookhollow was valued at 132 percent of [787] book, book value is 11.97 cents per share and trading market opinion, $15.75 a share.

Q And the Capital Bank?

A Capital Bank we valued at 150 percent of book value which was $20.33 per share, trading market was $30.50 per share.

Q And Century Bank in Garland?

A One hundred and fifty percent of book value, which was $14.18 per share, the trading market opinion was $21.25 per share.

Q First National in Lancaster?

A First National of Lancaster we valued at 108 percent of book, book was $41.72 and the trading market opinion was $45.

Q First Texas Bank?

OUT OF THE PRESENCE AND HEARING OF THE JURY:

A First Texas Bank we valued at 150 percent of book, book value was $7.62 per share and the trading market opinion was $11.50.

Q Garland Bank and Trust?

A Garland Bank and Trust was valued at 120 percent of book value, book value was $19.03 and the trading market opinion was $22.75.

Q Inwood National?

A Inwood National, 141 percent of book, book [788] value was $50.16, trading market opinion $70.75.

Q And the Love Field National?

A Love Field, 120 percent of book, book value $13.56, trading market opinion was $16.25.

Q Metro Bank?

A Excuse me, Metro, 141 percent of book, book value was $19.62 and trading market opinion was $27.50.

Q And the Prestonwood?

A Prestonwood is 180 percent of book, book value of $12.54, trading market of $22.50 per share.

Q Let's see, I guess that is Prestonwood National, the name of it?

A We don't have that here.

Q The Reunion Bank?

A Reunion Bank we valued at 150 percent of book, book value was $6.07 per share and trading market opinion was $9 per share.

Q And the Trinity National?

OUT OF THE PRESENCE AND HEARING OF THE JURY:

A Trinity National, 120 percent of book value, book value was $16.00 per share and the trading market opinion was $19.25 per share.

Q And the White Rock Bank?

A We valued White Rock at 141 percent of book, [789] book value was $7.09 per share, our trading market opinion was $10 per share.

Q And the Wynnewood Bank?

A Wynnewood was valued at 108 percent, book value of $11.63 per share, trading market opinion $12.50 per share.

Q And the Equitable Bank?

A The Equitable, 150 percent of book value, book value was $9.53 a share, trading market opinion $14.25 per share.

Q And the Pan American National?

A Pan American was valued at 150 percent of book which was $5.63 per share, our approximate trading market opinion, $8.75 a share.

• • •

Q (By Mr. Luna) Now, I'm going to hand you what has been marked for identification purposes as [790] Defendants' Exhibit Number 14 and ask you to identify that one, please, sir.

A This is a list of individual banks owned by multi-bank holding companies, the banks being located in and around the Dallas County area.

• • •

OUT OF THE PRESENCE AND HEARING OF THE JURY:

[809] Q Now, I want to hand you another instrument from Plaintiffs' Exhibit 28, one, the third page on the one that is marked Plaintiffs' Exhibit 28, and our testimony shows that this information was sent by the tax assessor to the bank calling for the information shown up here on the top, capital stock, surplus and undivided profits, and that again is the book value.

A That is how I would define it, yes.

Q And of course, they asked them also to put on there real estate because of the statutory responsibility of subtracting that. Now, with that information [810] that the County asked for, showing that total information, $6,367,000, $675.41, that being American Bank and Trust Company, our testimony shows that the tax assessor used that figure to appraise the value of the stock. Now, let's assume for us, if you will, sir, that in appraising or valuing that same stock, that you decided to use the equity capital or book value as a measuring stick for the value of the stock. In using that capital that is shown on that sheet, if you did it in that manner, would you in any way give any consideration to what was in the assets or federal securities, in particular?

A Not in calculating the book value, I wouldn't, no.

Q All right, sir, and if you used the book value as a measuring stick for the value of the stock, you still would not in that step?

A In that step, no.

• • •

(Excerpts from the testimony, by deposition, of Robert H. Sewell, an officer of petitioner Equitable Bank).

[878] "Question: Mr. Sewell, when the bank purchases a United States Treasury bill, mechanically how is that transaction handled, what account is debited, what account is credited?

"Answer: In simple form, you debit your bond account for the purchase and you credit, in my situation, correspondent bank or cash, I have a correspondent bank account for it."

Now, if you'll skip to Line 22, in other words, we're leaving out Lines 14, through 21:

"Question: On your, excuse me, on your Exhibit Number 11 that would be, that would show where the correspondent bank assets were located — excuse me, that would contain correspondent bank funds?

"Answer: Item 1, cash and due from depository institutions.

"Question: And then item 2 would be where U.S. Treasury securities are shown?

"Answer: Yes, sir.

"Question: So that when a U.S. [879] Treasury security is purchased, item 1 would be decreased and item 2 would be increased, is that correct?

"Answer: That is true. The money could come out of, you know, you might also at the same time, if you don't have enough money in item 1, decrease loans or something. Like I stated before, it comes somewhere out of the five million dollars total assets.

"Question: Now, that transaction would not affect the amounts shown in the capital accounts on Exhibit Number 11 in any way, would it?

"Mr. Dawson: You are talking about lines, under equity capital, 26 through 31?

"Mr. Gibbs: Yes.

"Question: (By Mr. Gibbs) 26 through 31 under equity capital.

"Answer: No, sir, it would not affect that.

"Question: The amount of capital would be the same before and after the transaction?

"Answer: Yes, sir, true.

"Question: Would the same be true [880] upon a sale of the U.S. Treasury bill, without taking into account any profit or loss?

"Answer: Yes, sir, there would be no effect.

• • •

(Excerpts from the testimony of Joe Jack Mills, County Auditor for respondent Dallas County).

[1047] Q (By Mr. Luna) All right. If someone, you or someone else, used this equity capital that we have been talking about as a measuring stick for the value of the stockholders' stock, or any other purpose, that person not only would not consider the amount of federal securities, but wouldn't even know that the bank owned any federal securities.

MR. YARBOROUGH: Same objection.

THE COURT: Okay. It will be overruled.

THE WITNESS: That's true, because this is the only information that we have right here, it doesn't allude to any other elements of the assets or the balance sheet.

Q (By Mr. Luna) All right. Now, let's assume, further, that the bank filled out this information and gave the amount of the total equity capital as we have shown here, as requested by the tax assessors. Let's assume further that the bank subtracted a figure from the equity capital and said that this is federal securities, but if we assume further that we ignore [1048] that part of the transaction and use only the equity capital figure as a measuring stick for the stock, would you again not be considering, in that transaction, the federal securities?

A That's true.

• • •

[1117] Q All right, sir. Now, my next question I would like for you to follow very carefully. If a form of taxation is a tax on bank shares and it is assessed or levied against the owner of the share, would you call that a tax on any federal obligations that might be owned by the corporation in this instance, [1118] the bank, that you own the shares in?

• • •

THE WITNESS. I would not consider it a tax on any assets held by the bank.

• • •

Q Yes, sir. Let me ask you just directly, would it be one way to take the equity capital or book value?

A That is a method.

Q That is a method. Now, if that method was used, would the form of taxation require, require the tax assessor to consider federal obligations in any [1119] manner in the computation of the tax?

A In my opinion, no.

• • •

(Sample from Plaintiffs' Exhibit 8)

NAME AND ADDRESS OF BANK

CALL NO. 130 FOURTH 1979 CALL 12-31-79
COUNTY DALLAS
BRS. — 000 SMSA — 1920 BHC — 1828

16345 13 48-2117
TEXAS AMERICAN BANK, DALLAS NORTH

P.O. Box 35207
DALLAS, TEXAS 75235

Please read carefully instructions for the preparation of reports of condition.

Every item and schedule must be filled in. Printed items must not be amended. Amounts which cannot properly be

ASSETS

1. Cash and due from depository institutions . . . .
2. U.S. Treasury securities . . . . . .
3. Obligations of other U.S. Government agencies and corporations . . . . . .
4. Obligations of States and political subdivisions in the United States . . . . . .
5. Other bonds, notes and debentures . . . . . .
6. Federal Reserve stock and corporate stock . . . .
7. Trading account securities . . . . . .
8. Federal funds sold and securities purchased under agreements to resell . . . . . .
9. a. Loans, Total *(excluding unearned income)* . . .
   b. LESS: allowance for possible loan losses . . .
   c. Loans, Net . . . . . .
10. Lease financing receivables . . . . . .
11. Bank premises, furniture and fixtures, and other assets representing bank premises . . . . . .

CONSOLIDATED REPORT OF CONDITION
(COMMERCIAL BANK)

(Dollar Amounts in Thousands)

ALL BANKS: RETURN ORIGINAL AND ONE COPY TO FDIC. PROCESSING SECTION, 550 17th STREET, N.W. WASHINGTON, D.C. 20429

NATIONAL BANKS: ALSO SEND ONE COPY TO THE APPROPRIATE REGIONAL ADMINISTRATOR AND FEDERAL RESERVE DISTRICT BANK

CLOSE OF BUSINESS DATE
December 31, 1979.

included in the printed items must be entered under Other Assets or Other Liabilities.

Sch.	Item	Col.		Mil.	Thou.	
C	8	—	. . . . .	17	156	1
B	1	E	. . . . .	14	647	2
B	2	E	. . . . .		NONE	3
B	3	E	. . . . .	28	155	4
B	4	E	. . . . .		50	5
. . . . .					NONE	6
. . . . .					NONE	7
. . . . .				11	000	8
A	10	126	636			9a
. . . . .		1	532			9b
. . . . .				125	104	9c
. . . . .					NONE	10
. . . . .				5	912	11

12. Real estate owned other than bank premises . . . .
13. Investments in unconsolidated subsidiaries and associated companies . . . . . .
14. Customers' liability to this bank on acceptances outstanding . . . . . .
15. Other assets . . . . . .
16. TOTAL ASSETS . . . . . .

LIABILITIES

17. Demand deposits of individuals, partnerships, and corporations . . . . . .
18. Time & savings deposits of individuals, partnerships, & corporations . . . . . .
19. Deposits of United States Government . . . . .
20. Deposits of States and political subdivisions in the United States . . . . . .
21. Deposits of foreign governments and official institutions . . . . . .
22. Deposits of commercial banks . . . . . .
23. Certified and officers' checks . . . . . .
24a. TOTAL DEPOSITS . . . . . .
a1. Total demand deposits . . . . . .
a2. Total time and savings deposits . . . . . .
25. Federal funds purchased and securities sold under agreements to repurchase . . . . . .
26. a. Interest-bearing demand notes *(note balances)* issued to the U.S. Treasury . . . . . .
b. Other liabilities for borrowed money . . . . .
27. Mortgage indebtedness and liability for capitalized leases . . . . . .
28. Bank's liability on acceptances executed and outstanding . . . . . .
29. Other liabilities . . . . . .

Sch.	Item	Col.			Mil.	Thou.	
. . . . .						530	12
. . . . .						NONE	13
. . . . .						608	14
G	3	. . . . .			5	093	15
(sum of items 1 thru 15)		. . . .			208	255	16
F	1e	A	. . . .		81	351	17
F	1e	B&C	. . . .		86	455	18
F	2	A,B&C	. . . .			254	19
F	3	A,B&C	. . . .		5	056	20
F	4	A,B&C	. . . .			NONE	21
F	5&6	A,B&C	. . . .		1	768	22
F	7	A	. . . .		2	464	23
(sum of items 17 thru 23)			. . . .		177	348	24
F	8	A	85	877			24
F	8	B&C	91	471			24
. . . . .					5	671	25
. . . . .					5	179	26
. . . . .						260	26
. . . . .						NONE	27
. . . . .						608	28
H	4	. . . . .			3	197	29

30.	TOTAL LIABILITIES (excluding subordinated notes and debentures)		
31.	Subordinated notes and debentures		
EQUITY CAPITAL			
32.	Preferred stock	a. No. shares outstanding	—
33.	Common stock	a. No. shares authorized	300,000
		b. No. shares outstanding	300,000
34.	Surplus		
35	Undivided profits		
36.	Reserve for contingencies and other capital reserves .		
37.	TOTAL EQUITY CAPITAL		
38.	TOTAL LIABILITIES AND EQUITY CAPITAL .		

Sch. Item Col.	Mil.	Thou.	
(sum of items 24a thru 29) . . .	192	263	30
. . . . .		NONE	31
. . . . . (par value) . . .		NONE	32
. . . . . (par value) . . .	3	000	33
. . . . .	8	750	34
. . . . .	4	242	35
. . . . .		NONE	36
(sum of items 32 thru 36)	15	992	37
(sum of items 30, 31 and 37) . . .	208	255	38

(Attachments and verification omitted in printing)

(Sample from Defendants' Exhibit 9)

K 082 Texas American Bank Dallas No Box 35207 Dallas Texas 75235 Government Pricing List 12/31/79 Page 1

Seq. No.	Description	Class Type	Coupon Rate	Maturity Date	Par Value
Pricing quotations used are derived from information made available to the servicing bank from other sources.					
Servicing bank, therefore, assumes no liability for the marketability of the securities listed at the prices quoted.					
5220	U S Treasury Notes	130	7.500	01/31/80	600,000.00
5240	U S Treasury Notes	130	7.500	03/31/80	1000,000.00
2600	U S Treasury Notes	130	7.375	05/15/81	1000,000.00
5400	U S Treasury Notes	130	8.375	08/15/81	1000,000.00
2000	U S Treasury Notes	130	7.750	11/15/81	1000,000.00
2300	U S Treasury Notes	130	7.750	11/15/81	1000,000.00
2200	U S Treasury Notes	130	8.000	05/15/82	1000,000.00
4220	U S Treasury Notes	130	8.000	05/15/82	1000,000.00
2100	U S Treasury Notes	130	8.125	08/15/82	2000,000.00
2400	U S Treasury Notes	130	7.875	11/15/82	1000,000.00
2500	U S Treasury Notes	130	7.875	11/15/82	1000,000.00
5800	U S Treasury Notes	130	11.625	05/15/83	2000,000.00
5690	U S Treasury Notes	130	9.750	09/30/83	500,000.00
6700	U S Treasury Note	130	9.250	05/15/84	500,000.00

Purchase Price	Purchase Date	Market			
		Yield	Price	Value	Variation
100.109375	01/31/78	16.134	99.312500	595,875.00	4,179.84–
99.890630	04/17/78	14.482	98.343750	983,437.50	16,376.02–
99.312500	01/29/76	11.728	94.625000	946,250.00	51,859.76–
100.093750	09/01/78	11.492	95.500000	955,000.00	45,541.05–
100.593750	01/29/76	11.360	94.062500	940,625.00	61,379.30–
100.843750	01/28/76	11.360	94.062500	940,625.00	62,221.31–
101.718750	01/28/76	10.878	94.125000	941,250.00	65,452.59–
102.421875	03/24/76	10.878	94.125000	941,250.00	68,433.37–
102.187500	01/28/76	10.870	93.875000	1877,500.00	140,579.48–
100.812500	01/28/76	10.800	92.937500	929,375.00	74,158.44–
100.906250	01/28/76	10.800	92.937500	929,375.00	74,566.23–
100.312500	11/15/70	10.564	102.937500	2058,875.00	52,579.36
99.871000	10/10/79	10.472	97.312500	489,062.50	10,315.50–
99.421880	09/10/79	10.356	96.187500	480,937.50	16,310.81–

DEFENDANTS' EXHIBIT NO. 12

GROUP I — PUBLICLY QUOTED

Bank	Deposits	Ratio Price to Book	Book Value Per Share	Actual Stock Price
Dallas International ..	72,790,000	65%	10.05	6.50
Lakewood	196,572,000	165%	8.50	14.00
Oak Cliff	169,382,000	144%	18.09	26.00
Preston	293,428,000	115%	8.90	10.25

(Excluded from evidence before the jury, and offered on a Bill of Exception outside the presence of the jury)

DEFENDANTS' EXHIBIT NO. 13

GROUP II — INDEPENDENT BANKS

Bank	Deposits	Ratio Price to Book	Book Value Per Share	Trading Market Opinion
North Dallas B & T ..	107,218,000	149%	34.57	51.50
Northpark National ..	143,250,000	203%	14.88	30.25
Bank of Dallas	62,488,000	150%	15.15	22.75
First Citizens Bank ..	62,057,000	132%	51.13	67.50
Grand Avenue Bank ..	66,308,000	120%	23.68	28.50
Valley View Bank	58,456,000	180%	13.90	25.00
Bank of Texas	30,224,000	120%	6.03	7.25
Brookhollow Nat'l	28,367,000	132%	11.97	15.75
Capital Bank	46,779,000	150%	20.33	30.50
Century (Garland) ...	22,216,000	150%	14.18	21.25
First Nat'l (Lancaster)	32,300,000	108%	41.72	45.00
First Texas Bank	18,747,000	150%	7.62	11.50
Garland B & T	36,080,000	120%	19.03	22.75
Inwood Nat'l	40,520,000	141%	50.16	70.75
Love Field Nat'l	12,757,000	120%	13.56	16.25
Metro Bank	49,282,000	141%	19.62	27.50
Prestonwood	25,767,000	180%	12.54	22.50
Reunion Bank	23,833,000	150%	6.07	9.00
Trinity National	26,034,000	120%	16.08	19.25
White Rock Bank	45,004,000	141%	7.09	10.00
Wynnewood Bank	33,231,000	108%	11.63	12.50
Equitable Bank	4,332,000	150%	9.53	14.25
Pan American Nat'l ..	9,186,000	150%	5.83	8.75

(Excluded from evidence before the jury, and offered on a Bill of Exception outside the presence of the jury)

DEFENDANTS' EXHIBIT NO. 14

GROUP III — HOLDING COMPANY BANKS

Bank	Deposits	Ratio to Price Book
First Nat'l (FIB)	$3,494,286,000	118%
Mercantile Nat'l (Merc)	1,690,546,000	103%
Rep. National (Rep)	3,400,378,000	86%
Citizens Nat'l (CF)	119,910,000	122%
First City	404,055,000	122%
Nat'l Bank Comm.	320,308,000	108%
First Garland (Rep.)	112,505,000	135%
Texas American	177,348,000	135%
American Bank (FIB)	85,901,000	132%
Dallas Nat'l (RPT)	50,684,000	132%
Greenville B&T (RPT)	88,498,000	150%
Park Cities (FIB)	97,233,000	180%
First Security — Dallas (FC)	30,726,000	150%
Grove St. (FIB)	32,374,000	150%
Tex Comm — Campbell	31,707,000	180%
Tex. Comm — Casa Linda	24,746,000	150%
Tex. Comm. — Dallas	38,418,000	132%
Tex. Comm. — NW	29,873,000	132%
Tex. Comm. — Park Cen.	19,721,000	180%
Tex. Comm. — Preston	27,560,000	180%
First Security — Garl.	41,131,000	150%
Tex. Comm — Garland	37,306,000	150%
American Nat'l (NE)	6,594,000	150%
American Nat'l Garl.	20,139,000	150%

Book Value	Trading Market Opinion	Acquisition Multiple Opinion	Acq. Value Opin.	Acq. Value Opin. Per Share
$60.23	$ 71.00	130%	$469,790,000	$ 78.30
33.05	34.00	125%	165,250,000	41.31
32.73	28.25	120%	432,040,000	39.28
35.99	44.00	180%	17,820,000	64.78
45.30	55.25	150%	55,540,000	67.95
2.24	2.50	150%	32,420,000	3.36
20.06	27.00	180%	14,440,000	36.11
53.31	72.00	180%	28,790,000	95.96
57.89	76.50	200%	12,740,000	115.78
45.66	60.25	200%	9,160,000	91.32
16.04	24.00	225%	15,160,000	36.09
32.34	58.25	250%	16,170,000	80.85
23.58	35.25	225%	5,300,000	53.06
52.80	79.25	225%	5,940,000	118.80
32.01	57.50	250%	5,800,000	80.03
44.06	66.00	225%	4,640,000	99.13
18.08	23.75	200%	6,410,000	36.16
85.70	113.00	200%	5,240,000	171.40
36.16	65.00	250%	3,890,000	90.40
33.41	60.00	250%	5,640,000	83.52
36.32	54.50	225%	7,350,000	81.72
11.91	17.75	225%	6,110,000	26.80
23.17	34.75	200%	2,780,000	46.34
16.98	25.50	225%	3,630,000	38.20

(Excluded from evidence before the jury, and offered on a Bill of Exception outside the presence of the jury)

DEFENDANTS' EXHIBIT NO. 15

Entity	Assessed Valuation
First National Bank in Dallas	$256,152,790
Mercantile National Bank	87,553,790
Republic National Bank of Dallas	294,591,060
Sub-total	638,297,640
	65.67%
Total all Dallas County banks	$971,980,250

Total Tax	County Tax at .004151	Community College at .0011	Hospital at .0032
2,164,742.23	1,063,290.23	281,763.07	819,688.93
739,917.08	363,435.78	96,309.17	280,172.13
2,489,589.05	1,222,847.49	324,050.17	942,691.39
5,394,248.36	2,649,573.50	702,122.41	2,042,552.45
8,214,211.59	4,034,690.25	1,069,184.24	3,110,337.10

(Excluded from evidence before the jury, and offered on a Bill of Exception outside the presence of the jury)

[Tr. 143]

No. 80-3206-G

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

AMERICAN BANK AND TRUST, et al
vs.
DALLAS COUNTY, TEXAS, et al

CHARGE OF THE COURT

MEMBERS OF THE JURY:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court; that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the foreman shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

[Tr. 144] These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The foreman, or any other juror, who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in the special issues in a sense which varies from the meaning commonly understood, you will be given in this charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

The special issues usually begin with the phrase "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. "PREPONDERANCE OF THE EVIDENCE" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case.

You are instructed that this lawsuit concerns, among other things, the application of the following statute enacted by the Congress of the United States:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

[Tr. 145] SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that defendant Dallas County in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

American Bank and Trust
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Capital Bank
Century Bank and Trust Co.
Citizens National Bank of Dallas
Dallas International Bank
Dallas National Bank
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First National Bank in Dallas
First National Bank in Garland
First National Bank of Lancaster
First Security Bank of Dallas, N.A.
First Security Bank of Garland
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank
Greenville Avenue Bank and Trust
Grove State Bank
Lakewood Bank & Trust Co.
Love Field National Bank
Mercantile National Bank at Dallas
MetroBank of Dallas
National Bank of Commerce

North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank & Trust Co.
Pan American National Bank of Dallas
Park Cities Bank
Preston State Bank
Prestonwood National Bank
Republic National Bank of Dallas
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank — Campbell Centre
Texas Commerce Bank — Casa Linda
Texas Commerce Bank — Dallas, N.A.
Texas Commerce Bank — Garland
Texas Commerce Bank — Northwest
Texas Commerce Bank — Park Central
Texas Commerce Bank — Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank
White Rock Bank of Dallas
Wynnewood Bank & Trust

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 146] SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that defendant City of Dallas in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

American Bank and Trust
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Capital Bank
Citizens National Bank of Dallas
Dallas International Bank
Dallas National Bank
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank
First National Bank in Dallas
First Security Bank of Dallas, N.A.
First Texas Bank
Grand Avenue Bank
Greenville Avenue Bank and Trust
Grove State Bank
Lakewood Bank & Trust Co.
Love Field National Bank
Mercantile National Bank at Dallas
MetroBank of Dallas
National Bank of Commerce
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank & Trust Co.
Pan American National Bank of Dallas
Preston State Bank
Prestonwood National Bank
Republic National Bank of Dallas
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank — Campbell Centre
Texas Commerce Bank — Casa Linda
Texas Commerce Bank — Dallas, N.A.

Texas Commerce Bank — Northwest
Texas Commerce Bank — Park Central
Texas Commerce Bank — Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank
White Rock Bank of Dallas
Wynnewood Bank and Trust

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 147] SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that defendant Dallas Independent School District in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

American Bank and Trust
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Capital Bank
Citizens National Bank of Dallas
Dallas International Bank
Dallas National Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank
First National Bank in Dallas
First Security Bank of Dallas, N.A.

First Texas Bank
Grand Avenue Bank
Greenville Avenue Bank and Trust
Grove State Bank
Lakewood Bank & Trust Co.
Love Field National Bank
Mercantile National Bank at Dallas
MetroBank of Dallas
National Bank of Commerce
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank & Trust Co.
Pan American National Bank of Dallas
Prestonwood National Bank
Republic National Bank of Dallas
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank — Campbell Centre
Texas Commerce Bank — Casa Linda
Texas Commerce Bank — Dallas, N.A.
Texas Commerce Bank — Northwest
Texas Commerce Bank — Preston Royal, N.A.
Trinity National Bank of Dallas
Wynnewood Bank and Trust

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 148] SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that defendant Town of Highland Park in computing the tax

for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

Park Cities Bank

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 149] SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that defendant Highland Park Independent School District in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

Park Cities Bank
Preston State Bank

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 150] SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that defendant City of Richardson in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its

taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

Canyon Creek National Bank

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 151] SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that defendant Richardson Independent School District in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

Equitable Bank
Texas Commerce Bank — Park Central
Valley View Bank
White Rock Bank

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 152] SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that defendant City of Garland in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its

taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

American National Bank of Garland
Century Bank and Trust Co.
First National Bank in Garland
First Security Bank of Garland
Garland Bank and Trust Co.
Texas Commerce Bank — Garland

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 153] SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that defendant Garland Independent School District in computing the tax for 1980 on the shares of the below-listed plaintiff banks within its taxing district, did not make a deduction for the United States obligations owned by the banks on January 1, 1980?

American National Bank of Garland
Century Bank and Trust Co.
First National Bank in Garland
First Security Bank of Garland
Garland Bank and Trust Co.
Texas Commerce Bank — Garland

Answer by checking the appropriate answer below:

It did not make a deduction for the United States obligations	X
It did make a deduction for the United States obligations	

[Tr. 154] After you retire to the jury room, you will select your foreman. The first thing the foreman will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the foreman:

a. To preside during your deliberations.

b. See that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge.

c. Vote with you on each issue.

d. Write your answers to the issues in the spaces provided.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the Court of this fact.

When you have answered all of the foregoing special issues which you are required to answer under the instructions of the Court, and your foreman has placed your answers in the spaces provided, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

JIM N. THOMPSON
Judge Presiding

Form No. 295-1

[Tr. 155] We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return into court as our verdict.

(To be signed by the foreman if unanimous.)

/s/ W. K. SIMS
Foreman

(To be signed by those rendering the verdict if not unanimous.)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	

[Tr. 122]

No. 80-3206-G

In the 134th District Court
Dallas County, Texas

American Bank and Trust, et. al.
v.
Dallas County, et. al.

Final Judgment

On January 6, 1981, came on to be heard the above entitled and numbered cause in which the following parties are plaintiffs:

American Bank and Trust
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Co.
Citizens National Bank of Dallas
Dallas International Bank
Dallas National Bank
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank
First National Bank in Dallas
First National Bank in Garland
First National Bank of Lancaster
First Security Bank of Dallas, N.A.
First Security Bank of Garland
First Texas Bank

Garland Bank and Trust Co.
Grand Avenue Bank
Greenville Avenue Bank and Trust
Grove State Bank
Inwood National Bank of Dallas
Lakewood Bank & Trust Co.
Love Field National Bank
Mercantile National Bank at Dallas
MetroBank of Dallas
National Bank of Commerce
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank & Trust Co.
Pan American National Bank of Dallas
Park Cities Bank
Preston State Bank
Prestonwood National Bank
Republic National Bank of Dallas
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank — Campbell Centre
Texas Commerce Bank — Casa Linda
Texas Commerce Bank — Dallas, N.A.
Texas Commerce Bank — Garland
Texas Commerce Bank — Northwest
Texas Commerce Bank — Park Central

[Tr. 123]

Texas Commerce Bank — Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank
White Rock Bank of Dallas
Wynnewood Bank and Trust (collectively referred to as "Bank Plaintiffs" herein)

and

Richard M. Hart, Frank Marshall, Ronald G. Steinhart, Peyton Cooper, Charles N. Brewer, Lynn D. Turner, A. A. Walker, and Woodrow Brownlee (the "Individual Plaintiffs" herein) all individually and on behalf of a class composed of the shareholders of the Bank Plaintiffs on January 1, 1980 (the "Class" herein),

and in which the following parties are defendants:

(a) "Dallas County Defendants" herein:

Dallas County
John Childs, individually and as tax assessor-collector for Dallas County
Board of Equalization of Dallas County, and its members Gary A. Weber, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr.

(b) "City of Dallas Defendants" herein:

City of Dallas
Max Noller, individually and as tax assessor-collector for the City of Dallas
Board of Equalization of the City of Dallas, and its members Port E. Stages, Jr., A. C. Moser, Jr., Dorothy Ramsey, and Jim S. Lake.

(c) "Dallas Independent School District Defendants" herein:

Dallas Independent School District
Max Noller, individually and as tax assessor-collector for the Dallas Independent School District
Board of Equalization of the Dallas Independent School District, and Port Stages, Jr., A. C. Moser, Jr., Dorothy Ramsey, and Jim S. Lake.

(d) "City of Garland Defendants" herein:

City of Garland
Tom Landrum, individually and as tax assessor-collector of the City of Garland.

(e) "Garland Independent School District Defendants" herein:

Garland Independent School District
J. W. Wall, individually and as tax assessor-collector for the Garland Independent School District.

(f) "City of Richardson Defendants" herein:

City of Richardson
Larry Devers, individually and as tax assessor-collector for the City of Richardson

(g) "Richardson Independent School District Defendants" herein:

[Tr. 124]

Richardson Independent School District
N. G. Johnson, individually and as tax assessor-collector for Richardson Independent School District
Board of Equalization for Richardson Independent School District, and its members R. H. Thompson, Nelson McCord, and Morris James.

(h) "Town of Highland Park Defendants" herein:

Town of Highland Park
Joy Montgomery, individually and as tax assessor-collector of the Town of Highland Park

Board of Equalization for Town of Highland Park and its members Frank R. Garrott, John Taylor, and George Nicaud.

(i) "Highland Park Independent School District Defendants" herein:

Highland Park Independent School District
Ernest Richardson, individually and as tax assessor-collector
Board of Equalization and its members Dr. Wendell A. Jones, Robert F. Titus, Morris E. Yarbrough, Jr.

All parties appeared by and through their attorneys of record, and each announced "ready" for trial, and a jury having been demanded, a jury consisting of twelve good and lawful persons was duly empaneled and sworn. The jury proceeded to hear the opening arguments, and the evidence. Upon being advised during the course of the trial that one juror had become ill and was unable to serve further, the Court excused such juror. Thereafter, the jury of 11 persons heard the remaining evidence and the arguments of counsel.

On January 14, 1981, at the conclusion of the evidence, the Court submitted the case to the jury on special issues. Thereupon, in response to special issues and instructions submitted to them by the Court in the "Charge of the Court," the jury, as duly attested and set out in the charge, concurred unanimously as to each and every one of the answers given. The charge of the Court, including the special issues and the verdict of the jury are incorporated herein for all purposes by reference. After the jury returned its verdict, plaintiffs moved for judgment on the verdict, and the defendants filed their respective motions to disregard

jury findings on special issues and for judgment as a matter of law.

[Tr. 125] Based on all the pleadings, the undisputed evidence, any stipulations of the parties, the verdict returned by the jury, and the law, the Court was originally of the opinion that the plaintiffs, including the Individual Plaintiffs and the members of the Class represented by the Individual Plaintiffs, should recover judgment against the defendants and signed a Final Judgment in favor of the plaintiffs on January 23, 1981.

Thereafter, all of the defendants filed timely motions to vacate or modify the Court's judgment signed on January 23, 1981 and to enter a new judgment in accordance with the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in Cause No. 20660, *Bank of Texas, et al v. John Childs, et al,* in its opinion issued on Motions for Rehearing and dated January 23, 1981.

On February 5, 1981, came on to be heard the motions of defendants to vacate or modify this Court's Final Judgment signed on January 23, 1981, and to enter a new judgment that plaintiffs do have and recover nothing from the defendants, and the Court, having considered the pleadings, undisputed evidence, stipulations, arguments of counsel and the applicable law, is of the opinion that the defendants' motions should be sustained; that this Court's Final Judgment signed on January 23, 1981 should be vacated; and the following made the judgment of the Court.

It is Accordingly Ordered, Adjudged and Decreed that the Final Judgment of the Court signed on January 23, 1981 be, and it is hereby vacated and is of no further force and effect.

The Court finds that the ad valorem tax on shares of Bank Stock is expressly authorized and required by Section 11.02 of the Texas Property Tax Code and by Article 7166 of the Revised [Tr. 126] Civil Statutes of Texas.

The Court further finds that Section 11.02 of the Texas Property Tax Code and Article 7166 of the Revised Civil Statutes of Texas do not violate any provision of the Constitution of the United States or the Constitution of the State of Texas and that the ad valorem tax on shares of bank stock authorized and required by said statutes is also in all respects constitutional under both the Constitution of the United States and the Constitution of the State of Texas.

The Court further finds that the ad valorem tax assessed in 1980 by each defendant on the shares of stock of the Bank Plaintiffs herein is in all respects legal as to all plaintiffs and to each member of the Class represented by the Individual Plaintiffs herein.

It Is Accordingly Ordered, Adjudged and Decreed that all plaintiffs, including all members of the Class represented by the Individual Plaintiffs, do have and recover nothing from the defendants, and each of them, and that all relief not specifically granted herein is in all things denied.

It Is Further Ordered, Adjudged and Decreed that all costs of court are hereby taxed against the plaintiffs, jointly and severally, for which execution may issue.

It Is Further Ordered that Plaintiffs, at their own expense, shall give notice of this judgment to all members of the above-described Class by means of first class United States mail.

IT IS SO ORDERED.

SIGNED on this, the 5th day of February, A.D. 1981.

JIM N. THOMPSON

Jim Noble Thompson, Judge of the
64th Judicial District Court, Sitting
for the Judge of the 134th Judicial
District Court of Dallas County, Texas

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,

Appellants,

v.

DALLAS COUNTY, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
June 3, 1981

OPINION

After examining the briefs and hearing oral argument in this case and reviewing the authorities cited, we have determined that all matters raised by appellants were fully considered in Bank of Texas v. Dallas County, 615 S.W.2d 810 (Tex. Civ. App. — Dallas, No. 20660, January 23, 1981, motion for rehearing overruled, April 30, 1981). For the reasons stated in our opinions in that case, the judgment of the trial court in the present case is affirmed.

CLARENCE A. GUITTARD
Chief Justice

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,

Appellants,

v.

DALLAS COUNTY, et al.,

Appellees.

Wednesday, June 3, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees Dallas County, et al, have and recover of and from the appellants, American Bank and Trust, et al and from the check deposit in the hands of the District Clerk of Dallas County, Texas made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,
Appellants,

v.

DALLAS COUNTY, et al.,
Appellees.

Wednesday, July 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-589, AMERICAN BANK & TRUST ET AL, v. DALLAS COUNTY ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

CHRONOLOGICAL LIST OF IMPORTANT DATES IN CASE NO. 20660

Date	Filing, Hearing, or Court Action
September 5, 1979	Plaintiffs' Petition Filed
August 27, 1980	Trial Commenced
August 28, 1980	Judgment Entered by Trial Court
September 5, 1980	Appeal Perfected to Dallas Court of Civil Appeals
November 7, 1980	Judgment Entered by Dallas Court of Civil Appeals
November 24, 1980	Motion for Rehearing Filed
January 23, 1981	Motion for Rehearing Granted and New Judgment Entered by Dallas Court of Civil Appeals
February 9, 1981	Motion for Rehearing Filed
May 1, 1981	Motion for Rehearing Denied by Dallas Court of Civil Appeals
June 1, 1981	Application for Writ of Error Filed
January 6, 1982	Application for Writ of Error Denied by Texas Supreme Court
March 17, 1982	Petition for Writ of Certiorari Filed
November 1, 1982	Writ of Certiorari Granted

[Tr. 18]

No. 79-9337-I

IN THE DISTRICT COURT
162ND JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

BANK OF TEXAS, et al
vs.
JOHN CHILDS, Individually and as Tax Assessor-Collector of Dallas County, Texas; DALLAS COUNTY, TEXAS; GARRY A. WEBER, County Judge; JIM JACKSON, NANCY JUDY, JIM TYSON and ROY ORR individually and as the Dallas County Commissioners Court and as the Dallas County Board of Equalization

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now come BANK OF TEXAS, a Texas banking corporation, and all its Shareholders of Record as of January 1, 1979, as listed on Exhibit "A" attached hereto (hereinafter called Plaintiffs), and complain of JOHN CHILDS, Individually and as Tax Assessor-Collector of the County of Dallas, and of the COUNTY OF DALLAS, TEXAS, its County Judge, GARRY A. WEBER, and its Commissioners, JIM JACKSON, NANCY JUDY, JIM TYSON, and ROY ORR, individually and in their capacity as members of the Dallas County Commissioners Court and as members of the County Board of Equalization, and would respectfully show the Court the following:

I.

PARTIES

Defendant JOHN CHILDS is the Tax Assessor-Collector for the County of Dallas, and has his place of business at the Dallas County Government Center, Dallas, Dallas County, Texas, and has been served and has answered.

Defendants, the COUNTY OF DALLAS, TEXAS, its County Judge, GARRY A. WEBER, and its Commissioners, JIM JACKSON, NANCY JUDY, JIM TYSON, and ROY ORR, have their place of business at the Dallas County Government Center, Dallas, Dallas County, Texas, and have been served and have answered.

[Tr. 19] Notice of this cause of action has also been given to the Attorney General's office of the State of Texas.

Plaintiff BANK OF TEXAS (hereinafter "Plaintiff Bank") is a Texas banking institution, having its office and principal place of business at 6260 Mockingbird Lane, Dallas, Texas. The Shareholders (hereinafter "Plaintiff Shareholders") are owners of capital stock in BANK OF TEXAS in Dallas County, Texas. These Plaintiffs seek common relief herein based upon identical questions of law and fact.

II.

TAX CONTRARY TO STATE LAW

Plaintiffs have reason to believe and do believe that Defendants intend to assess and collect a tax on the shares of BANK OF TEXAS from the Shareholders of said bank, and that Defendants will do so unless the Court enjoins Defendants from so doing. These acts on the part of Defendants constitute a plan of taxation in violation of Article 7166 and Article 7150.6 of Texas Revised Civil

Statutes, because Defendants threaten to assess and impose a tax on BANK OF TEXAS shares differently and at a greater rate than is assessed against other monied capital in the hands of individuals which is located within the County of Dallas.

A. *Statutes.*

Article 7150.6 of Texas Revised Civil Statutes Annotated reads as follows:

"Art. 7150.6. Exemption of intangible property

(a) *Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.*

(b) *Intangible property is taxable ad valorem if its taxation is provided for by Article* 7105, *7165, 7166,* or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes); by Article 4.01, Insurance Code, as amended; by Chapter 194, Acts of the 60th Legislature, Regular Session, 1967 (Article 7244a, Vernon's Texas Civil Statutes); or by Chapter 358, Acts of the 54th Legislature, 1955 (Article 7105a, Vernon's Texas Civil Statutes).

[Tr. 20] (c) For purposes of this article, 'intangible property' means a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share deposit account, insurance policy, dis-

ability or retirement benefit, cause of action, contract, and goodwill." (Emphasis ours).

Article 7166 of Texas Revised Civil Statutes Annotated reads as follows:

"Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. *Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.*" (Emphasis ours).

B. *Liability of Plaintiff Shareholders.*

A tax scheme that levies against only one type of monied capital, bank stock, while not levying against any other monied capital in the hands of individuals is in obvious violation of Article 7166, Texas Revised Civil Statutes Annotated. Article 7150.6 provides for taxation of intangible personal property such as bank stock only if taxable under Article 7166. Plaintiffs allege Article 7166 authorizes no tax on these Plaintiffs. Defendants are attempting to impose an Article 7166 tax on the Plaintiff Bank's capital stock. Because of the recent amendments [Tr. 21] to the Texas Constitution (Article VIII, Section 1) and statutes arising thereto which in essence exempted all personal property in the hands of individuals from taxation, under Article 7166, taxation of bank stocks owned by individuals is now contrary to the validly determining statutes and is fundamentally erroneous and illegal. Effective administrative relief is not now available to Plaintiff Shareholders, and all administrative remedies have been exhausted.

C. *Liability of Plaintiff Bank.*

It has been the long established practice and custom of the Plaintiffs and Defendants that taxes purported to be legally imposed by Defendants on Plaintiff Shareholders are billed to the Bank by Defendants and paid by the Bank on behalf of its respective shareholders to prevent Defendants' imposition of the lien provisions in Article 7166.

If a tax is imposed against the Shareholder Plaintiffs and such tax is not paid under Article 7166, the Bank Plaintiff will be forbidden by law from transferring any shares of stock on which the tax is in default and will be prohibited from declaring dividends as to any such

shares. Thus, the Plaintiff Bank is without legal and/or administrative remedy from the lien in the absence of the relief requested herein.

III.

TAX CONTRARY TO FEDERAL LAW

As further grounds, Plaintiffs would show that any attempt by the Tax Assessor-Collector to compute the fair market value of the various bank shareholders' stock without subtracting the value of United States Government obligations held by BANK OF TEXAS from the sum total of the capital of the bank is in direct contravention and in violation of Title 31 U.S.C., Sec. 742, which provides an exemption from taxation:

> "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, *directly or indirectly,* in the *computation* of the tax, except nondiscriminatory franchise or other nonproperty taxes **[Tr. 22]** in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. (R.S. Sec. 1301; Sept. 22, 1959, P. L. 86-346, Title I, Sec. 105(a), 73 Stat. 622.)" (Emphasis ours).

Plaintiffs have reason to believe and do believe that Defendants intend to assess and collect a tax on the shares of BANK OF TEXAS without deducting the value of United States Government obligations held by BANK OF TEXAS in computing the fair market value of the stock in the hands of shareholders. Such action by the Tax Assessor-Collector is in direct contravention of the laws of the United States.

IV.

TAX PLAN ILLEGAL

Defendants' actions as set forth in Paragraph II and III and Defendants' scheme and plan of taxation which they again are threatening to put into effect for the present tax year are fundamentally illegal, and each and all of such actions are illegal.

V.

TAX UNCONSTITUTIONAL

If the Defendants certify the tax rolls pursuant to Article 7206(4), Texas Revised Civil Statutes, implement a tax plan including the Bank share tax, and thereafter implement a tax against these Plaintiffs, presumably under Articles 7166 and 7150.6, Texas Revised Civil Statutes, then such statutes become unconstitutional as interpreted and implemented by Defendants.

A. The Defendant County's interpretation of Articles 7150.6 and 7166, Texas Revised Civil Statutes, results in an unconstitutional tax. Articles 7150.6 and 7166, as followed by the Defendants, are unconstitutional in that they provide without rational basis for an ad valorem tax on the capital stock issued by Plaintiff Bank and owned by Plaintiff Shareholders, while at the same time deliberately omitting the taxation of the stocks of all corporations other than incorporated banks and the vast majority of other intangible personal property of other taxpayers; and thereby unlawfully discriminate against Bank Shareholders. Their effect is to omit large amounts of personal property, including, but not being limited to, mortgages, savings accounts, [Tr. 23] certificates of deposit, demand or time deposits, share accounts, share deposit accounts, contracts, share certificate accounts, stocks, bonds, credits, cash, ac-

counts receivable, notes receivable, disability or retirement benefits, causes of action, goodwill, insurance policies and others. The taxation of this other intangible personal property is authorized by the Texas Constitution, Article VIII, Section 1. This results in substantial injury to the Plaintiffs in that the bank stock owned by the Shareholder Plaintiffs will be taxed at a greater rate and will be required to bear a greater proportion of the tax burden (1) than the owners of the omitted property and (2) than the Shareholder Plaintiffs would be required to pay if all personal property, such as that enumerated above, were included in the tax rolls. Not only would the tax base be greater if the omitted personal property were included, but also the rate of tax necessary to raise the amount of money required for the operation of the County, State and related taxing jurisdictions would be less than the rate which will actually be imposed because of such omission. Further, this greater tax burden upon owners of bank stock places Texas banks, state and national, including Plaintiff Bank, at a competitive disadvantage with savings and loan associations and non-banking corporations in the marketing of their stock and the ability to attract additional shareholder equity.

Articles 7150.6 and 7166, thus interpreted, establish a deliberately arbitrary and discriminatory scheme of taxation which results in substantial injury to Plaintiffs. Accordingly, Articles 7150.6 and 7166 violate the mandate of Article VIII, Section 1, of the Constitution of the State of Texas that all taxation be equal and uniform. For the same reason such statutes are also contrary to the equal protection clauses of the United States Constitution, Amendment XIV, and the Texas Constitution, Article 1, Section 3, and to the due process clauses of the United States Constitution, Amendment XIV, Section 1, and the Texas Constitution, Article 1, Section 19.

[Tr. 24] B. When the Defendant County's interpretation of Article 7166 results in the Defendant County Tax Assessor determining the actual cash value of the Plaintiff Shareholders' stock from a formula under Article 7165, Texas Revised Civil Statutes, which includes U. S. obligations, the Texas statutes as implemented are contrary to the United States Constitution. As such, the Articles 7165, 7166 and 7150.6, Texas Revised Civil Statutes, violate the supremacy clause insofar as Congress has preempted such taxation by its enactment of 31 U.S.C. 742. The Article 7165 formula excludes Federal Bonds but fails to exclude other United States Government obligations. The Defendants' following of such formula is contrary to 31 U.S.C. 742, which prohibits any state, municipal or local authority from taxing directly or indirectly any obligations of the United States. By not subtracting the value of the United States' obligations from Plaintiff Banks' assets before determining the actual cash value of the capital stock issued by them, the Defendants are imposing an indirect tax on United States Government obligations in violation of 31 U.S.C. 742. Thus, this scheme of taxation and Bank share tax are unconstitutional under Article VI, the Supremacy Clause, of the United States Constitution.

VI.

TAX PLAN UNCONSTITUTIONAL

Defendants' unlawful and discriminatory conduct against Plaintiffs has resulted in substantial injury as herein shown, and for the reasons set forth above, the 1979 assessed values on Plaintiff Bank's shares of stock and the taxes based thereon are (a) unequal, (b) not uniform, (c) actually and substantially discriminatory, (d) grossly excessive, (e) based on an arbitrary, illegal, and a funda-

mentally erroneous plan and scheme of assessment and taxation and for each and all of said reasons the assessed values are in violation of the United States and Texas Constitutions and are illegal, invalid, and void and of no force and effect, and the Court should so find and decree, and give Plaintiffs relief as prayed herein.

VII.

WRIT OF MANDAMUS

[Tr. 25] Plaintiffs would show that the foregoing verified allegations entitle them to this Honorable Court's issuance of Writ of Mandamus, ordering the Defendant Tax Assessor-Collector of the County of Dallas, Texas:

1. To adopt a policy and plan of taxation assessing all monied capital including bank stock in the hands of individuals within the County upon a uniform and equal basis; and

2. To subtract the value of United States Government obligations held by BANK OF TEXAS from the capital of the bank in determining the fair market value of the shares of the bank held by its shareholders.

VIII.

INJUNCTIVE RELIEF

Pleading in the alternative, Plaintiffs would show, absent this Honorable Court's issuance of the prayer for the Writ of Mandamus, that they are entitled to relief ordered by this Court's including the issuance of a Temporary Injunction against Defendants and entitled thereafter to a Permanent Injunction against Defendants.

A. *Present Status of Tax Plan.*

Plaintiffs would show to the Court that the tax rolls of the Defendant County have not been completed, certified or approved as to these Plaintiffs; that the resulting taxes for 1979 have not yet become due; that none of such taxes have yet been legally collected; and, that this Court should, prior to such events, or any of them, issue its temporary injunction and permanent injunction, so that the arbitrary, illegal, discriminatory and fundamentally erroneous assessments and valuations of Plaintiffs' properties may be corrected and rectified at the earliest possible date. This Court has issued its temporary restraining order preventing the certification of the rolls, resulting implementation and collection of taxes. The parties have stipulated that the temporary restraining order should remain in existence until the trial of this cause. The wrongful conduct of the defendants can now be prevented and corrected [Tr. 26] without loss to the public and with less cost and inconvenience to the defendants and more effectively insofar as plaintiffs' rights are concerned.

B. *Substantial Damage.*

Unless Defendants are restrained and enjoined as hereinafter prayed, Plaintiffs will suffer immediate irreparable harm and substantial injury and damage for which they have and will have no adequate remedy at law, and the Defendants will pursue their wrongful, arbitrary, fundamentally erroneous, highly discriminatory and illegal methods and schemes of assessment and taxation, and will fix discriminatory and grossly excessive assessments on Plaintiff Bank's shares of stock, and will complete, approve, and certify the tax rolls of the respective taxing districts and commence attempting to collect taxes based upon such illegal assessments and tax rolls.

1. Denial of Constitutional Rights — By such acts, Defendants will deny Plaintiffs their rights under the Federal and Texas Constitutions which require due process of law, equal and uniform taxation and equal protection of the laws.

2. Preservation of the Status Quo — Moreover, unless the Defendants are restrained, enjoined and ordered as hereinafter prayed, the Defendants, by their threatened and intended acts described above, will destroy the status quo presently existing between them and Plaintiffs.

3. Loss of Effective Remedy and Subject to Additional Damages — Plaintiff will be deprived of effective remedy against Defendants, relegated to the defense of a delinquent tax suit, and subject to penalty, interest, court costs and attorney's fees.

4. Creation of Lien — If Plaintiffs wait until the taxes become delinquent and fall into default, a lien is created for such taxes and, by statute, there is a restriction upon the payment of dividends or transfer of the stock.

5. Additional Burden — In the absence of an injunction, the burden on these Plaintiffs to show substantial injury by law is greatly increased and Plaintiffs must show substantial injury upon the trial of this action in dollars and cents.

[Tr. 27] Plaintiffs have filed a bond, in accordance with Rule 684, Texas Rules of Civil Procedure, as set by this Honorable Court.

C. *Injunction Sought.*

Plaintiffs have no adequate remedy at law and Defendants should be restrained and enjoined from carrying out their illegal acts as hereinabove alleged. Plaintiffs will

suffer irreparable injury, loss and damage unless such injunction is issued. Plaintiffs are therefore entitled to relief through this Court's issuance of a temporary injunction and, upon final hearing hereof, a permanent injunction against Defendants enjoining Defendants, their agents, servants, and employees, directly or indirectly, from:

(a) Certifying the tax rolls, approving the county tax plan and implementing the tax plan as it applies to their Plaintiffs for 1979;

(b) Issuing ad valorem tax statements for taxes on shares in Plaintiff Bank;

(c) Imposing or collecting any ad valorem taxes for the tax year 1979 on shares of Plaintiff Bank held by the Plaintiff Shareholders;

(d) Doing any act calculated or intended to enforce or attempt to enforce any assessments or collection of taxes on shares in Plaintiff Bank;

(e) Considering United States obligations held by Plaintiff Bank in ascertaining the banks' capital for the purpose of computing any tax on shares of Plaintiff Bank for the tax year 1980;

(f) The enforcement of any lien created by Article 7166, Texas Revised Civil Statutes, for any taxes claimed by Defendants to be due for 1979 upon shares in Plaintiff Bank. The Court should specifically provide in the injunction that the Plaintiff Bank have and shall have the full right to transfer shares and declare dividends notwithstanding any threatened tax for 1979 as alleged herein.

[Tr. 28] D. *Mandatory Injunction.*

In addition to the relief above set out, Plaintiffs seek a mandatory injunction requiring the Defendants to omit

from the tax rolls all bank stock issued by the Plaintiff Bank and owned by the Plaintiff Shareholders and other shareholders of the Plaintiff Bank.

IX.

DECLARATORY JUDGMENT

Plaintiffs are persons whose legal relations are affected by the interpretation of Articles 7150.6 and 7166, Texas Revised Civil Statutes, and Plaintiffs are entitled to declaratory relief under Article 2524-1, Texas Revised Civil Statutes. Plaintiffs are entitled to a declaratory judgment that (1) Section 7150.6 is unconstitutional; or (2) in the alternative, under Article 7150.6 in conjunction with Article 7166, there is no authority to assess any tax whatsoever upon any stock of Plaintiff Bank and (3) that if any tax at all is lawful, 31 U.S.C., § 742, requires that United States obligations held by Plaintiff Bank not be considered in ascertaining the bank's capital and actual cash value for the purpose of computing any tax on the shares of Plaintiff Bank owned by Plaintiff Shareholders.

Plaintiffs further allege that the purported assessments or assessed values on Plaintiff Bank's shares of stock which Defendants are attempting to make final and to use as the basis for collecting taxes on said shares of stock are void and of no force or effect for each and all of the grounds and reasons hereinabove set forth, and Plaintiffs herein affirmatively seek to have same held and declared void and further affirmatively seek the injunctive relief, both prohibitory and mandatory, hereinafore set forth.

X.

TENDER

In connection with the injunctive relief sought in this Petition, Plaintiffs show that it is their position that [Tr. 29] no taxes whatsoever can be validly assessed or collected on the capital stock issued by the Plaintiff Bank and owned by the Plaintiff Shareholders. However, if this Court should determine that, in order to do equity, Plaintiffs should tender into the registry of the Court security in such amount as the Plaintiffs would owe under the Defendants' proposed scheme, should it be finally determined that said capital stock is subject to ad valorem taxation, then Plaintiffs hereby offer to tender into the registry of the Court security in such amounts. In further support of Plaintiffs' offer to do equity, the Plaintiffs hereby agree that they are willing to deposit such sums, representing the taxes which would be due and owing under the Defendants' proposed scheme if this Court should determine that any taxes at all can be assessed against said bank stock under the laws and Constitution of this State, into the registry of the Court at any time required by the Court or to furnish such security as may be required by the Court for the payment of such taxes.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court:

A. (1) issue its Writ of Mandamus, requiring Defendants to perform their duties as hereinabove more specifically set out in Paragraph VII and alternatively, Plaintiffs pray that:

(2) a Temporary Injunction issue enjoining Defendants, their agents, servants and employees from directly or indirectly:

(i) enforcing or attempting to enforce the aforesaid assessments and the collection of taxes on said assessments;

(ii) certifying the tax rolls, approving the taxing plan for the county tax year of 1979, and implementing the 1979 tax plan as it applies to Plaintiffs;

[Tr. 29] (iii) issuing tax notices or statements to Plaintiffs;

(iv) attempting to impose or collect taxes for the year 1979 from Plaintiffs based upon the illegal scheme and plan of taxation employed or threatened to be employed by the Defendants;

(v) doing any act calculated or intended to enforce or attempt to enforce any assessments or collection of taxes on shares in Plaintiff Bank;

(vi) doing any act which is intended, designed or calculated to persuade, order or induce Plaintiffs to accept improper valuations, all as set forth above;

(vii) considering United States obligations held by Plaintiff Bank in ascertaining the bank's capital or actual cash value for the purpose of computing any tax on shares of Plaintiff Bank for the tax year 1979;

(viii) fixing or creating or attempting to fix or create any lien for 1979 taxes on or against any of Plaintiff Bank's shares of stock or preventing any declaration and payment of dividends by Plaintiff Bank.

B. Upon final hearing on the merits, the temporary injunction be made permanent;

C. Plaintiffs further pray for the declaratory relief requested in Paragraph IX herein;

D. Judgment be entered against Defendants for all costs of suit; and

E. Plaintiffs have such other and further relief, general and special, at law or in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

(Signatures, Affidavit, and Exhibits omitted in Printing)

[Tr. 39]

No. 79-9337-I
IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

162ND JUDICIAL DISTRICT

BANK OF TEXAS, et al.
VS.
JOHN CHILDS, et al.

DEFENDANTS' SECOND AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Come now all Defendants and file this their Second Amended Original Answer, and would show the Court as follows:

I.

Defendants specially except to that portion of Plaintiffs' First Amended Petition, paragraph II, which alleges that "defendants threaten to assess and impose a tax on the shares in Plaintiff Bank of Texas differently and at a greater rate than is assessed against other moneyed capital in the hands of individuals which is located in the County of Dallas," because such statement fails to give notice to Defendants of the identity of "other moneyed capital" that Plaintiffs claim is being taxed at a lesser rate than bank stock, and Defendants are unable to properly prepare a defense to this allegation. Defendants pray judgment of this special exception.

II.

Defendants would show the Court that they have complied with Articles 7150.6 and 7166 of V.A.T.S. with regard to the taxation of the property in question. These articles authorize such tax. Article VIII, Section 1, of the Texas Constitution, has been amended so that it is not mandatory that all intangibles be taxed but such is permissible. Article 7150.6, which was in effect only for the year 1979, specifically provides for the taxing of bank stock as follows:

[Tr. 40]

> "(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . .
>
> (c) For purposes of this article, 'intangible property' . . . includes a stock . . . ."

Article 7166 states the manner of taxing bank stock and Article 7150.6 exempts other intangibles except for certain types as set out therein. Article 7166 and 7150.6 are not in conflict, and, if they are in conflict, Attorney General's Opinion MW-139 (1980) provides that where two statutes conflict, the one passed last by the legislature is controlling. The opinion states that:

> "The Code Construction Act, however, states the following general rule: ' . . . if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.' "

Therefore, as stated above, Article 7150.6, being the last statute passed, is controlling, and other intangibles are thereby exempt from taxation.

III.

Articles 7150.6, 7165, 7166 and 7206 of V.A.T.S. comply in all respects with the Constitutions of both the State of Texas and the United States. The tax plan of Defendants is not illegal, arbitrary, excessive, discriminatory or fundamentally erroneous. The tax plan of Defendants complies with all pertinent Constitutional and statutory provisions of both the State of Texas and the United States.

IV.

This tax is against the owner of the stock and not the Bank, and the U.S. Government obligations are owned by the Bank. Defendants would also show that Title 31 U.S.C. § 742 does not require the deletion or deduction of U.S. Government obligations held by the bank Plaintiffs prior to determining the value of the [Tr. 41] capital stock in question which is owned by another and not the Bank. Such act, as amended, is a mere codification of existing judicial decisions which have specifically approved the method followed by these Defendants in ascertaining market value of bank stock. The fact that the Bank may have a custom of paying the tax is not material and does not change the legal responsibility of the stockholder to pay the tax.

V.

For further answer, Defendants would show the Court that Dallas County had only one tax rate for 1979 for all taxable property, including bank stock. Therefore, no bank stock was taxed or threatened to be taxed at any greater

rate in 1979 in Dallas County than any other taxable property.

VI.

There is no justifiable controversy between Plaintiff Bank of Texas and Defendants. Plaintiff Bank of Texas is not a proper party because such Plaintiff seeks to complain about a tax which is not imposed or threatened to be imposed upon it. Rather, Plaintiffs have alleged that such tax will be imposed upon owners of shares in Bank of Texas. Plaintiff Bank of Texas has no justifiable interest in a tax which is not imposed on it.

VII.

This action is moot and not timely filed. The tax plan attacked by Plaintiffs was put into effect on August 13, 1979, and this cause of action was not filed until September 5, 1979. The relief sought by Plaintiffs is not available unless such cause of action is filed before the tax plan is put into effect.

VIII.

Plaintiffs have adequate remedies at law. All taxpayers have the right to appear before the Board of Equalization to contest **[Tr. 42]** the value of their property. The Plaintiffs herein could have appeared and requested whatever valuation they felt appropriate for the property in question. If Plaintiffs disagreed with the valuation of their property as set by the Board of Equalization, Article 7345(f) V.A.T.S. provides for right of appeal to a district court. Further, since Plaintiffs contend they owe no tax at all, they could wait until suit was brought to collect same before raising their contentions as defenses thereto. The addition of penalties and interest to the tax in such

suit does not decrease the adequacy of the remedy since penalties and interest are only added if Plaintiff loses. These remedies do not increase burdens of proof on Plaintiffs.

IX.

Plaintiffs do not have standing to bring mandamus to cause a public official to do his job.

X.

No Plaintiff will suffer or has suffered any substantial injury by reason of the tax plan of Defendants.

XI.

Defendants deny each and every allegation contained in Plaintiff's First Amended Petition and demand strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs take nothing by their suit, and for such other and further relief, general and special, at law and in equity, to which the Defendants may be entitled, and that Defendants go hence with their costs without day.

Respectfully submitted,

(Signature and Affidavit omitted in printing)

(Excerpts from the testimony at trial of Respondent John Childs, tax assessor-collector for respondent Dallas County)

[152] Q And in reaching a value of the stock, you were taking into consideration of the cash value of the stock after subtracting the real estate, right, of the corporate stock?

A That's correct.

Q You were not at all in any way even **[153]** considering any bonds directly or indirectly?

A No, sir.

• • •

[170] Q So the rendition and the working papers that have been introduced in evidence here, I believe it's Plaintiff's Exhibit No. 4, is simply a formula or a method that your office used to find what you believed the cash market value of that stock was?

[171] A That's correct.

Q And has the Bank of Texas ever brought you any information to show that the sale of that stock during those years after subtracting the real estate was any less than what it was placed on the tax roll at?

A Not to my knowledge.

• • •

[175] Q (By Mr. Chantilis) Mr. Childs, with respect to this Defendant's Exhibit No. 1 for the **[176]** year 1979 in the computation of the cash value of the bank shares of the Bank of Texas, did you or did you not subtract United States Government obligations?

A (By the Witness) Not to my knowledge.

[226] Q All right, now in simplified form, and I don't want to put words in your mouth, how did you arrive at

the value that you placed upon the bank shares of the Bank of Texas?

A Took the capital, surplus and undivided profits.

Q You took the capital, surplus and undivided profits. Now what was that number?

A $2,632,078.

Q Two million, six —

A Thirty-two-o-seventy-eight.

Q All right, and what did you do then, sir?

A Then I subtracted all of the real estate that's located outside of Dallas County.

Q All right, sir, what about the real estate that's located inside Dallas County?

A Well, sir, there is portions of the real estate outside Dallas County assessed at different ratios so you had to take your assessed value and take them back to 100 percent, subtract that 100 percent value of real estate outside of Dallas County from your 100 percent capital structure to get adjusted value. Then once we got the adjusted value, the ratio was 35 percent in 1979, we took 35 percent of the adjusted figure to get the [227] adjusted capital. From that we subtracted the 35 percent assessment of all real estate located in Dallas County.

Q All right, so what figures did you subtract from the $2,632,078 net worth of the bank?

A A 100 percent of realty located outside of Dallas County.

Q How much was that, sir?

A Three-fifty-one-o-two-nine.

Q All right, and then what else did you subtract?

A That gives you an adjusted figure of $2,281,049.

Q All right, sir.

A We took 35 percent of that figure which would give you an assessment figure of 798370.

Q What does that represent?

A That's the adjusted capital.

Q All right, sir.

A From that figure we deducted the real estate on the Dallas County Tax Roll assessed to Texas Bank or Bank of Texas in the amount of $207,150 which gives us a valuation of 591,220 which was to be assessed as to shares of stock.

Q Did you subtract anything else from the [228] $2,632,078 figure other than real estate in Dallas County and the real estate out of Dallas County?

A No, sir.

Q So if I were to ask you if you deducted from that evaluation the value of United States Treasury bills, bonds and notes and other obligations, your answer would be that you did not, sir?

A That's correct.

Q The same answer you gave me when we took your deposition?

A Yes, sir.

• • •

[Tr. 48]

No. 79-9337-I

In the District Court
of Dallas County, Texas,
162nd Judicial District

Bank of Texas and
William C. Murphy

vs.

John Childs, et al.

JUDGMENT

On this the 28 day of August, 1980, came on to be heard in its regular order on the docket the above entitled and numbered cause. The parties appeared by and through their respective attorneys of record and announced ready for trial. A jury being waived, the Court proceeded to hear the pleadings, evidence and argument of counsel and, after hearing same, is of the opinion and finds that the law and the facts are with the defendants, that all temporary orders heretofore entered herein should be dissolved, and that the plaintiffs should take nothing as against the defendants herein.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that all temporary orders of any sort heretofore entered herein shall be and the same are hereby dissolved and that the plaintiffs take nothing by their action against the defendants.

It Is Further Ordered, Adjudged and Decreed by the Court that all costs of court incurred herein shall be and the same are hereby taxed against the plaintiffs, for all of which let execution issue.

SIGNED AND ORDERED ENTERED this the 28 day of August, A. D. 1980.

DEE BROWN WALKER

Judge

• • •

[Tr. 59]

No. 79-9337-I

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS,
162ND JUDICIAL DISTRICT

BANK OF TEXAS, ET AL.
VS.
JOHN CHILDS, ET AL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of the Plaintiffs in the above entitled and numbered cause, I make and file the following as my findings of fact and conclusions of law therein:

FINDINGS OF FACT

1. All Plaintiffs except the Bank of Texas were shareholders of stock in the Plaintiff Bank of Texas on January 1, 1979.
2. Plaintiff Bank of Texas is a Texas banking corporation located and doing business in the City of Dallas, Dallas County, Texas.
3. Defendant Dallas County is a county of the State of Texas.
4. The tax plan of Dallas County for 1979 included a tax on bank shares which were owned by shareholders of the Bank.
5. The tax assessed on the shares was and is owed by the shareholders and was not and is not owed by the Bank.

6. The Bank of Texas is exempt from payment of franchise tax to the State and was not assessed taxes on Bank owned personal property but non-banking corporations in Dallas County in 1979 were required to pay each of these taxes.

7. Art. 7150.6, V.A.T.S., establishes reasonable classifications for taxation.

8. Art. 7166, V.A.T.S., establishes reasonable classifications for taxation.

9. Dallas County taxed all property taxable under the laws of Texas in Dallas County in 1979 at the same rate.

10. The tax plan of Dallas County for 1979 does not discriminate against any Plaintiff.

[Tr. 60] 11. The tax plan of Dallas County for 1979 was applied in an equal and uniform manner.

12. The tax plan of Dallas County for 1979 did not result in grossly excessive taxes assessed against any Plaintiff.

13. Dallas County did not tax U.S. Government obligations in 1979.

14. No Plaintiff appeared before the Board of Equalization of Dallas County to protest the assessed value of stock in the Bank of Texas.

15. The Court further finds that the facts support the judgment rendered herein.

Any finding of fact hereinabove made which also constitutes a conclusion of law is adopted as a conclusion of law.

CONCLUSIONS OF LAW

1. Dallas County has authority to assess, levy and tax stock in the Bank of Texas in 1979. Vernon's Ann. Tex. Const., art. 8, § 1-a.

2. The tax plan of Dallas County for the year 1979 complies with the Constitution of the State of Texas.

3. The tax plan of Dallas County for 1979 complies with the Constitution of the United States.

4. The tax plan of Dallas County for 1979 as applied to Plaintiffs is in compliance with the Constitution of the State of Texas.

5. The tax plan of Dallas County for 1979 as applied to Plaintiffs is in compliance with the Constitution of the United States.

6. The tax plan of Dallas County for 1979 complies with Art. 7150.6, V.A.T.S.

7. The tax plan of Dallas County for 1979 complies with Art. 7166, V.A.T.S.

8. Art. 7150.6, V.A.T.S., complies with all provisions of the Constitution of the State of Texas.

[Tr. 61] 9. Article 7150.6, V.A.T.S., complies with all provisions of the Constitution of the United States.

10. Article 7166, V.A.T.S., complies with all provisions of the Constitution of the State of Texas.

11. Article 7166, V.A.T.S., complies with all provisions of the Constitution of the United States.

12. The tax plan of Dallas County for the year 1979 is legal.

13. The application of the tax plan of Dallas County for 1979 to Plaintiffs is legal.

14. No Plaintiff will suffer substantial damage or injury by reason of the implementation of the tax plan of Dallas County for 1979.

15. Plaintiffs had adequate remedies at law.

16. The tax assessed and levied on the Bank shares was and is owed by the shareholders and was not and is not owed by the Bank.

17. Payment by the Bank of taxes owed by shareholders in the past has no legal significance in this case.

Any conclusion of law hereinabove made which also constitutes a finding of fact is hereby adopted as a finding of fact.

Signed 19 September 1980.

DEE BROWN WALKER

Judge

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Roberston
Opinion by Justice Robertson
November 7, 1980

OPINION

This is an action for mandamus, injunction, and declaratory judgment filed by the Bank of Texas and all of its shareholders against Dallas County, John Childs individually and as Tax Assessor-Collector of Dallas County, and the Dallas County Board of Equalization. Plaintiffs alleged that the Dallas County tax plan for 1979, which taxes shares of stock in banks, is illegal under state law, or is illegal as implemented under federal law, or, if not prohibited by state or federal law, is unconstitutional. Trial before the court resulted in a judgment for defendants. We reverse and remand with instructions.

[*Note: This opinion was withdrawn by the court below, and replaced by the opinion of the court dated January 23, 1981. See Appendix p. 174 below.*]

Timeliness of Suit

Initially we are faced with appellees' contention that appellants' suit was not timely filed and therefore the judgment of the trial court should be affirmed. The law is settled that a taxpayer may seek the remedies of mandamus and injunction prior to the time the tax plan is put into effect. *City of Arlington v. Cannon,* 153 Tex. 566, 271 S.W.2d 414 (1954). The question in this case is whether appellants filed suit prior to the time the tax plan was put into effect.

The Board of Equalization approved the tax lists of assessed values on July 30, 1979. Taxes were levied and the tax rate was set on August 13, 1979. Appellants filed suit on September 5, 1979. The tax roll recap was corrected and approved by the Board of Equalization on September 17, 1979. Mailing of the tax statements began immediately prior to October 1, 1979. Appellees argue that the actions taken on July 30 and August 13 put the tax plan of Dallas County into effect. We do not agree.

The tax plan of Dallas County for 1979 was put into effect when the corrected tax roll was approved by the Board of Equalization on September 17, 1979. *Del Valle Independent School District Board of Equalization v. Hackett,* 563 S.W.2d 338 (Tex. Civ. App. — Waco 1978, writ ref'd n.r.e.); *Owens-Illinois, Inc. v. Little Cypress-Mauriceville Independent School District,* 481 S.W.2d 477 (Tex. Civ. App. — Beaumont 1972, no writ); *Crocker v. Santo Consolidated Independent School District,* 116 S.W.2d 750, 756 (Tex. Civ. App. — Eastland 1938, writ dism'd). The action of September 17, 1979 was the final action taken by the Board of Equalization and, as such, the date of that action is the date the tax plan was implemented. Since appellants filed suit prior to that time, their suit was timely filed. Appellees' reliance on *Dorman v.*

Ferris Independent School District, 581 S.W.2d 783 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.) and *Zglinski v. Hackett,* 552 S.W.2d 933 (Tex. Civ. App. — Austin 1977, writ ref'd n.r.e.) is misplaced. In both of those cases suit was filed after the final action of the Board of Equalization had been taken.

State Law

Appellants argue that appellees have no authority to tax shares of bank stock under state law and thus the 1979 tax plan is illegal. TEX. REV. CIV. STAT. ANN. art. 7166 states:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with the said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in

> default in the payment of his taxes upon the same. *Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.* [Emphasis added.]

TEX. REV. CIV. STAT. ANN. art. 7150.6 provides in pertinent part:

> (a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . . .

Reading these two statutes together, appellants argue that since article 7166 provides that bank shares may not be taxed at a greater rate than is assessed against other moneyed capital in the hands of individuals, and since article 7150.6 expressly prohibited any tax on moneyed capital in the hands of individuals, any tax on bank shares must be at a greater rate than is assessed against other moneyed capital in the hands of individuals and thus prohibited by article 7166.

Appellants stipulated at oral argument that if their construction of these two statutes is correct, article 7150.6 effectively repeals article 7166 by implication. We do not agree with appellants' construction of these statutes. Article 7150.6 prohibits taxation of all intangible property except as provided for in certain specified statutes. One of those statutes is article 7166. If the intention of the legislature were to repeal article 7166 by enacting article 7150.6, the provision in article 7150.6 for taxation under article 7166 would be unnecessary. It is generally presumed that every word in a statute is used for a purpose, *Bomar v. Trinity National Life and Accident Insurance Company,*

579 S.W.2d 464 (Tex. 1979), and it must be presumed that the legislature did not intend to do a useless thing. *Brown v. Memorial Villages Water Authority,* 361 S.W.2d 453 (Tex. Civ. App. — Houston 1962, writ ref'd n.r.e.). Old and new statutes that are not positively repugnant should be construed so as to give effect, if possible, to both because repeal by implication is not favored. *Standard v. Sadler,* 383 S.W.2d 391 (Tex. 1964). The only part of article 7166 that cannot be reconciled with article 7150.6 is the last sentence. Consequently, we hold that only the last sentence of article 7166 was impliedly repealed by article 7150.6. After reading the two statutes together, and giving effect to both to the extent possible, we hold that the county has authority to tax bank shares. Accordingly, we overrule appellants' point of error complaining of lack of authority to tax under state law.

Federal Law

Article 7166 provides that shares of bank stock are to be taxed only for the difference between their actual cash value and the proportionate amount per share at which the bank's real estate is assessed. Dallas County determined the actual cash value of the shares in this case by totaling the capital accounts of the bank, subtracting therefrom the assessed value of real estate and dividing by the number of shares. Included in the capital accounts of the bank were all United States obligations owned by the bank. Appellants argue that computing the actual cash value of the shares of bank stock in this way violates the exemption from state and local taxation of obligations of the federal government provided by 31 U.S.C. § 742. We agree. 31 U.S.C. § 742 states:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State

> or municipal or local authority. *This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. [Emphasis added.]

Appellees argue that the tax in question is a tax on bank shares assessed against the stockholders, and not a tax upon the federal obligations owned by the bank. Citing *Van Allen v. Assessors,* 3 Wall 573, 18 L.Ed. 229 (1886), and subsequent supreme court decisions, appellees argue that the supreme court has consistently upheld taxes such as the one here. Each of the cases cited by appellees was decided prior to 1959.

In 1959 section 742 was amended to include the second sentence. The only cases construing section 742 after it was amended are *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978); and *First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913 (1978). In both of those cases the Supreme Court of Montana held that a tax on shareholders that *considered* the value of United States obligations owned by the bank violated section 742. That court stated:

> The language of the 1959 amendment is clear, unambiguous, direct and certain. The plain language provides an exemption to *every form of state taxation that requires United States obligations or interest to be considered directly or indirectly in the computation of the tax.* The statute speaks for itself. [Emphasis in original.] *Montana Bankers Association v. Montana Department of Revenue, supra* at 912

We agree. We find nothing ambiguous or unclear in the statute. Both parties before us argue the legislative history of section 742 in support of their positions, but neither party argues that the statute is ambiguous. When confronted with a statute which is plain and unambiguous on its face, courts do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *Fairport P. & E. R. Co. v. Meredith,* 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1934); *Wilbur v. United States,* 284 U.S. 231, 52 S.Ct. 113, 76 L.Ed. 261 (1931); *Brazos River Authority v. City of Graham,* 163 Tex. 167, 354 S.W.2d 99 (1961); *Board of Insurance Commissioners of Texas v. Guardian Life Insurance Co. of Texas,* 142 Tex. 630, 180 S.W.2d 906 (1944); *Baylor University Medical Center v. Borders,* 581 S.W.2d 731 (Tex. Civ. App. — Dallas 1979, writ ref'd n.r.e.).[1] We hold that the plain language of section 742 as amended exempts United States obligations from being considered in the computation of any state or municipal or local tax. The tax here in question is illegal because United States obligations were included in determining the actual cash value of the property to be taxed.

We do not hold that article 7166 is invalid as being contrary to the Supremacy Clause of the United States Constitution. We hold only that the tax plan adopted by the county under the authority of article 7166 is illegal because that plan does not make a proper assessment of taxable value. It will not be presumed that the legislature intended to enact a statute contrary to the federal constitution and

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[1] Although § 3.03(3) of the Code Construction Act, TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Supp. 1980) provides that a court construing a statute may consider the legislative history of the statute whether or not the statute is considered ambiguous on its face, the Code Construction Act does not apply to federal statutes. *See id.* § 1.02.

laws. *City of Waco v. Texas Life Insurance Co.*, 248 S.W. 315, 318 (Tex. Comm'n App. 1923, judgmt. adopted). Therefore, article 7166 necessarily excludes United States obligations from the computation of actual cash value.

Substantial Injury

Appellees argue that appellants are not entitled to injunctive relief because, under the rule of *City of Arlington v. Cannon, supra,* appellants have not shown substantial injury. Citing Thompson v. City of Houston, 410 S.W.2d 813 (Tex. Civ. App. — Houston 1967, writ ref'd n.r.e.) and *Anderson County Taxpayers' League v. City of Palestine,* 576 S.W.2d 679 (Tex. Civ. App. — Tyler 1979, no writ), appellees argue that for appellants to show substantial injury they must show that each appellant's *total* tax bill will be substantially raised if the tax plan is put into effect. We do not agree. *Cannon, Thompson,* and *Anderson County Taxpayers' League* were inequality cases in which the plaintiffs had to show that the discrimination alleged worked to their detriment by assessing their property at a higher proportion of its true value than other classes of property. These cases do not hold that in *any* tax case the taxpayer must show his total tax bill, considering all kinds of property he owns, will be substantially raised if the tax plan is put into effect. Neither do they hold that the question of substantial injury should be determined by assuming an increase in the tax rate to compensate for any taxes found to be illegally assessed.

The case before us is not an inequality case. It is not necessary for appellants to show discrimination in order to prevail. It is sufficient for appellants in this case to show that the tax is illegal and that they are the objects of the illegal taxing scheme. *See City of Wichita Falls v. Cooper,* 170 S.W.2d 777 (Tex. Civ. App. — Fort Worth 1943, writ ref'd). In this case appellants have shown substantial in-

jury by showing the difference between the amount of tax on the bank shares they will be required to pay when federal obligations are considered in computing the tax and the amount of tax they would be required to pay when federal obligations are not considered in computing the tax.

Constitutional Challenges

Appellants attack the 1979 Dallas County tax scheme on various constitutional grounds. Since we have held that the tax assessed against appellants is illegal under federal law, we need not reach appellants' constitutional arguments and we decline to do so. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Since we have held the tax illegal, we reverse the judgment of the trial court. As there is no indication that the case has not been fully developed, we need not order another trial. On grounds hereinabove indicated, it is our opinion that plaintiffs are entitled to the final injunction as prayed, and that the trial court should have rendered judgment invalidating the assessments complained of. The trial court is therefore instructed to render judgment granting the injunction in accordance with this opinion.

Reversed and remanded with instructions.

TED Z. ROBERTSON
Associate Justice

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Friday, January 23, 1981

ORDER GRANTING APPELLEES' MOTION FOR REHEARING

This day came on to be heard appellants' and appellees' motion for rehearing in the above cause, and the same being inspected, it is considered, adjudged and ordered that appellants' motion be overruled, and that appellees' motion be granted; and that the former judgment of this court rendered on November 7, 1980 be set aside and the following substituted therefor, to-wit:

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
Concurring Opinion by Justice Robertson
January 23, 1981

OPINION
ON MOTIONS FOR REHEARING

The principal question in this case is the validity of the tax on bank shares assessed by Dallas County under article 7150.6 and 7166 of the Texas Revised Civil Statutes.[1] The suit was brought by the Bank of Texas, a state banking corporation, and all its shareholders, against the county, its tax assessor-collector, and board of equalization, for mandamus, injunction, and declaratory relief, alleging that the county's tax plan of 1979 is illegal under state law, or if not illegal, unlawfully discriminates against holders of bank shares because no such tax is assessed against other intangible property including other moneyed capital in the hands of individuals. The bank and its shareholders further contend that the assessment is illegal under fed-

[1] These articles were repealed by Section 6(a)(1) of the Property Tax Code, effective January 1, 1982. TEX. LAWS 1979, ch. 841, at 2329.

eral law because it considers the value of obligations of the United States held by the bank in computing the tax, contrary to the federal statute exempting such obligations from taxation.

After a trial without a jury, the trial court upheld the tax and denied the relief sought. We affirm.

State Law

We consider first the contention that the county has no authority to tax shares of bank stock because article 7150.6, which exempts most intangible property from taxation, has the effect of repealing the tax on bank shares imposed by article 7166. Since article 7166 is not expressly repealed, we must examine the two statutes to determine whether the legislature intended to impliedly repeal the tax on bank shares. We conclude that no such repeal was intended by the legislature.

Article 7166 is as follows:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered

> property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960).

The pertinent provisions of article 7150.6 are as follows:

> (a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166, or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes) .... TEX. REV. CIV. STAT. ANN. art. 7150.6 (Vernon Supp. 1980).

The bank and its shareholders contend that since article 7166 provides that bank shares may not be taxed at a greater rate than other moneyed capital in the hands of individuals, and article 7150.6 expressly exempts such other moneyed capital from taxation, 7166 no longer imposes a tax on bank shares. They acknowledged in oral argument that this contention means that article 7166 has been repealed by implication.

We do not agree that article 7166 was repealed by article 7150.6. Since repeals by implication are not favored, old and new statutes that are not positively repugnant will each be construed so as to give effect to both, if possible. *Standard v. Sadler,* 383 S.W.2d 391, 395 (Tex. 1964). We have no difficulty in construing these two statutes so as to give effect to both. In fact, article 7166 falls within an express exception to the exemption of intangible property from taxation provided by article 7150.6(a). It would be clearly contrary to the legislative intent to hold that an earlier statute expressly specified in an exception to the later statute is repealed by the later statute.

The only provision of article 7166 that is arguably repealed by article 7150.6 is the last sentence of article 7166, which provides:

> Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against all other moneyed capital in the hands of individuals.

If the intent of article 7150.6 is to repeal all taxes on "other moneyed capital in the hands of individuals" but to retain the tax on bank shares, as the reference to article 7166 in subsection (b) of article 7150.6 indicates, then the last sentence of article 7166 above quoted may no longer be effective. This interpretation is preferable to ascribing to the legislature the intent to repeal article 7166 in its entirety because of the express exclusion of the bank shares tax in article 7150.6(b). Moreover, repeal of only the last sentence would be supported by the rule that when two statutes have conflicting provisions, the earlier statute will be held to be repealed only to the extent of the conflict, and otherwise will be construed as remaining in effect. *Whittenberg v. Craven,* 258 S.W. 152, 153 (Tex. Com. App.

1924, judgmt adopted); *Texas State Board of Pharmacy v. Kittman,* 550 S.W.2d 104, 107 (Tex. Civ. App. — Tyler 1977, no writ); *Parker v. State,* 208 S.W.2d 380, 383-84 (Tex. Civ. App.), *aff'd* 147 Tex. 57, 212 S.W.2d 132 (1948). Consequently, rather than construe article 7150.6 as repealing article 7166 in its entirety, we would be required to construe it as repealing only the last sentence.[2]

However, it may not be necessary to go so far as to hold that the last sentence of article 7166 has been repealed by article 7150.6. Subdivision (b) of article 7150.6 enumerates several statutes in addition to article 7166 that are excluded from the exemption of intangible property from taxation. We need not determine whether any of these other statutes impose a tax on "moneyed capital in the hands of individuals." There is no contention here that any of them does impose such a tax, but if any of them do, the last sentence of article 7166 may still be effective to forbid the taxation of bank shares at a greater rate than the tax imposed by any of those statutes. If none of them imposes such a tax, then the last sentence may have no effect until and unless legislation is enacted imposing such a tax.

Furthermore, we note that there is no evidence in the present record that there is, in Dallas County or elsewhere,

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[2]That construction would be reasonable in view of the fact that the provision forbidding taxing bank stock at a greater rate than "other moneyed capital in the hands of individuals," was apparently taken from section 5219 of the Revised Statutes of the United States, which authorized state taxation of shares of national banks, but not at a greater rate than "other moneyed capital in the hands of individual citizens of such State." Since the federal statute has now been amended to provide that a national bank shall be treated the same as a state bank for purposes of state taxation, 12 U.S.C. § 548 (1976), it is reasonable to suppose that the corresponding limitation in article 7166 is no longer necessary.

any "other moneyed capital in the hands of individuals" that is exempt from taxation under article 7150.6. Consequently, there is no evidence the tax plan of Dallas County is illegal on the ground that the bank shares in question are taxed at a greater rate than "other moneyed capital in the hands of individuals."

For the reasons stated, we hold that when article 7150.6 and article 7166 are read together, and effect is given to both to the extent possible, a tax is still imposed on bank shares. Our holding in this respect is not contrary to *Childs v. Reunion Bank,* 587 S.W.2d 466, 470 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). That case concerned taxes assessed before the exemption provided by article 7150.6 became effective, and this court held that since the record showed that numerous classes of taxable property, including other moneyed capital in the hands of individuals, were subject to taxation, but were not included in the tax rolls, the assessment on bank shares was in violation of article 7166. That holding cannot control this case because of the provisions of article 7150.6, which, as already explained, by its express reference to article 7166, excludes bank shares from the exemption of intangible property, and, consequently, would have the effect of repealing only the last sentence of article 7166, if that sentence would otherwise extend the exemption to bank shares.

Inequality of Taxation

The bank and its stockholders contend further that if a tax is imposed on bank shares by articles 7150.6 and 7166, these statutes are unconstitutional because they deliberately omit taxation of shares of non-banking corporations and most intangible personal property, contrary to article VIII, section 1, of the Texas Constitution, which provides, "Taxation shall be equal and uniform." The county responds that under article VIII, section 1, as amended effective Janu-

ary 1, 1979, taxation of intangible property is permitted, but not required. We agree with the county's interpretation. Formerly, this section provided, "All property in this State . . . shall be taxed in proportion to its value . . . ." As amended, it provides, "All real property and tangible personal property in this State . . . shall be taxed in proportion to its value . . . ." The amendment adds further that the legislature "may provide for the taxation of intangible property." We interpret the amendment to mean that the legislature may tax intangible property or exempt it, or tax certain classes of intangible property and exempt others.

We recognize that section 1 as amended still provides, "Taxation shall be equal and uniform." With respect to intangible property, this requirement applies only to property which the legislature decides to tax, and permits reasonable classification for tax purposes, so long as the taxes are equal and uniform within each class. *See Hurt v. Cooper,* 130 Tex. 433, 110 S.W.2d 896, 900-01 (1937); *Grayson County State Bank v. Calvert,* 357 S.W.2d 160, 162 (Tex. Civ. App. — Austin 1962, writ ref'd n.r.e.).

The further contention is made, however, that articles 7150.6 and 7166 deny equal protection of the laws, and, therefore, also offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because no shares of other corporations are so taxed. This contention raises the question of reasonable classification. The authorities recognize that the states have a wide leeway in making classifications which, in their judgment, produce reasonable systems of taxation. *Kahn v. Shevin,* 416 U.S. 351, 355 (1974). Accordingly, a state tax law that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Id.* (tax exemption of widows not applying to widowers upheld).

We conclude that bank shares form a class of stock that, for tax purposes, may reasonably be distinguished from other intangible property, including other shares of stock. Banks enjoy powers and privileges not granted to other corporations. As the county points out, other corporations are subject to franchise taxes, which are not imposed on banks. Based on these differences, we cannot say that the legislature has singled out bank shares for arbitrary and unreasonable discrimination.

This conclusion is supported by *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181 (1933), in which it was contended that a tax on state banks denied equal protection because it was not also imposed on other corporations competing with banks. The court held:

> We cannot say that the state Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business, notwithstanding actual competition between them.
>
> Mere competition between them is not enough to show two concerns must be burdened alike. The state Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious, or wholly unreasonable. *Id.* at 185-86.

In the present case it is also suggested that no valid discrimination can rest on the difference between banks and other corporations without repudiating the distinction between a tax on bank assets and on bank shares. The county

relies on this distinction, established in *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866), to avoid application of the exemption of federal securities held by the bank in assessing the tax on the shares. The *Van Allen* rule will be discussed in the next section of this opinion. At this point we need observe only that we cannot accept the view that even though there may be valid grounds to distinguish between banks and other corporations, bank shareholders must be treated like all other shareholders for purposes of taxation. This is a question of equal protection rather than one of determining what property Congress has exempted from state taxation or has permitted the state to tax, such as that before the Supreme Court in *Van Allen.* If a state decides to give more favorable tax treatment to shareholders in corporations that pay franchise taxes than to shareholders in corporations that do not pay such taxes, such a classification cannot be regarded as arbitrary or unreasonable, and, therefore, the constitutional principle of equality is not offended. Consequently, we hold that the tax imposed on bank shares by articles 7150.6 and 7166 is valid and constitutional.

Exemption of Federal Securities

Another ground alleged as establishing invalidity of the county's plan for taxing bank shares is its failure to deduct the value of the federal securities held by the bank from the bank's net assets before apportioning their value pro rata in determining the value of the shares. Article 7166 provides that the real estate owned by the bank shall be separately rendered and assessed, and that all shares shall be rendered at their actual cash value, but that each share shall be assessed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed. No provision is made for a sim-

ilar deduction with respect to the federal securities held by the bank.

The evidence shows that the assessed value of the shares for 1979 was determined by book value rather than market value, that is, by subtracting the bank's liabilities from its total assets, deducting the assessed value of its real estate, and dividing that net figure by the number of shares to determine the taxable value per share. There is also evidence showing that if all obligations of the United States held by the bank were deducted from the value of the net assets, nothing would remain to be divided proportionately among the shareholders. The bank and its shareholders contend that this method of assessment is illegal under section 3701 of the Revised Statutes of the United States, 31 U.S.C. § 742 (1976), which provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The first sentence of this statute was enacted originally in 1862.[3] The second sentence was added by amendment in 1959.[4]

Before the amendment, state taxation of bank shares without allowing any deduction for federal securities was upheld by a well-established line of decisions by the Supreme Court of the United States, beginning with *Van*

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[3] Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 346.

[4] Pub. L. No. 86-346, § 105(a), 73 Stat. 622 (1959).

Allen v. The Assessors, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866). The bank and its shareholders insist that the 1959 amendment to section 3701 changed the rule established by those decisions because the amendment extended the exemption to "every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly in the computation of the tax," with exceptions not applicable to the present case. They rely on *Montana Bankers Ass'n v. Montana Department of Revenue, Mont.*, 580 P.2d 909 (1978), which held that the 1959 amendment is unambiguous and by its plain language precludes the assessment of a tax on bank shares that requires obligations of the United States to be considered directly or indirectly in the computation of the tax.

Although we originally reached the same conclusion as the Montana court, further examination of section 3701 in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, "Except as otherwise provided by law," and also ignores another statute, section 5219 of the Revised Statutes of the United States,[5] which falls within this exception. As we shall show

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[5]Section 5219 was originally included in the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, and was later codified as section 5219 of the revised statutes. It was also embodied in 12 U.S.C. § 548 (1964). It was amended in 1969 to provide simply that for the purpose of any federal or state tax law, a national bank "shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. § 548 (1976). We refer in this opinion to section 5219 as it existed in 1959, when section 3701 was amended, because our primary question turns on the meaning of section 3701. The 1969 amendment is evidently intended to broaden rather than restrict congressional consent to state taxation of national banks. *See* S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 1594.

in the discussion following, section 5219, upon which the *Van Allen* rule is based, expressly consents to local taxation of national banks, and, by implication, also consents to taxation of shares in state banks. It has been construed in *Van Allen* and the cases following it to extend this consent to the full interest of the shareholder in shares in both national and state banks, even though the tax is measured by the bank's capital without any deduction of federal securities held by the bank. When we read the exemption statute, section 3701 as amended in 1959, together with the consent statute, section 5219, it appears to us that Congress did not intend by the amendment to withdraw in any respect its consent to state taxation of national or state bank shares.

Consideration of this question must begin with the *Van Allen* opinion itself. The main question in that case was whether the state of New York had the power to tax the shares of national banks whose capital was wholly invested in obligations of the federal government. Counsel contended that the shares were exempt, citing the exemption statute (later codified as section 3701 of the Revised Statutes of the United States) and also the federal government's power to borrow money, as conferred by article I, section 8 of the Constitution of the United States. The opinion of the Supreme Court does not expressly refer to either the statute or to this provision of the Constitution, but evidently considered the question in the light of both. The Court does discuss at length and quotes from the consent statute a provision of the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, which then provided that the shares of national banks should be subject to taxation by state authority, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and providing further that such a tax "shall not exceed the rate imposed

upon the shares of any of the banks organized under the authority of the State." 70 U.S. (3 Wall.) at 581, 18 L.Ed. at 233.

The Supreme Court first considered the question of whether the tax was invalid because no similar tax was levied on the shares of state banks. The Court pointed out that the New York statute levied a tax on the capital of state banks, but since their capital might also be invested in federal securities, which were exempt from taxation, such a tax was not equivalent to a tax on the stockholders, such as that assessed against the stockholders of national banks. Consequently, the tax was held to be invalid under that section of the consent statute providing that taxes imposed on national banks should not exceed the rate imposed on the shares in state banks.

The Court went on to say, however, that since this defect might be remedied by the state legislature, (presumably by imposing a similar tax on shares in state banks), it would consider the main question of the power of the state to authorize the taxation of the shares of national banks whose capital was wholly invested in obligations of the federal government. In deciding this question, the Court again relied on the provisions of the National Bank Act and its express consent to state taxation of such shares, and held that such a tax was valid on the ground that the Congress, in authorizing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation. This appears to be the primary ground of the opinion. As an additional ground, the Court held that the tax on the shares was not a tax on the capital of the bank because of the shareholders' separate ownership of the shares. In discussing this ground, the Court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares, saying that although Con-

gress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act.

The *Van Allen* opinion bears directly on the question of whether the consent statute permits the state's taxing power to apply only to that portion of the shareholder's interest in the bank's capital that was not invested in obligations of the federal government. After a detailed analysis of the National Bank Act, the Court concluded that Congress had intended to make the entire interest of the shareholders subject to taxation, and observed that such a limitation on the meaning of the term "shares" would be "so grave and important a change in the use of the term that, if so intended, would not have been left to judicial construction." 70 U.S. (3 Wall.) at 588, 18 L.Ed. at 236.

The *Van Allen* decision has been repeatedly reaffirmed and regarded as "settled law" by the Supreme Court. *See, e.g., People v. Commissioners of Taxes,* 71 U.S. (4 Wall.) 244 (1867); *Des Moines Nat'l Bank v. Fairweather,* 263 U.S. 103, 112-114 (1923); *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). In *Bowers* the Court characterized section 3701 as a legislative expression of the constitutional principle of the exemption of federal securities from state and local taxation, derived from the power of the federal government to borrow money conferred by article I, section 8, of the Constitution of the United States, and from the Supremacy Clause, article VI, clause 2.

The *Van Allen* rule was extended to shares in state banks in *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902). In that case a trust company organized under the laws of Ohio argued that the state tax on its shares should be computed by deducting from its capital certain federal securities because of the exemption provided by section 3701 of the

Revised Statutes of the United States. The Supreme Court observed that this argument claimed a greater immunity for the shares in the trust company than section 5219 provided for shares in national banks. In response to the argument that the laws of Congress governing taxation of national bank shares were immaterial to the power of the state to tax state bank shares, the Court held:

> The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want of harmony. *Id.* at 115.

As we understand the *Lander* opinion, it holds that section 5219, which by its terms consents to state taxation of national bank shares, also extends to state bank shares, and that any contrary interpretation of the exemption statute, section 3701, would bring it into conflict with section 5219. This conclusion logically follows from the *Van Allen* holding that the New York state tax on national bank shares was invalid because it imposed no equivalent tax on state bank shares. Of course, no federal consent was required for state taxation of the shares of state banks, as distinguished from national banks, except to the extent that state bank shares would otherwise have been exempt under section 3701 because of federal securities held by the bank. Consequently, the only pertinency of section 5219 to the *Lander* case was its effect on the exemption otherwise provided by section 3701. In other words, the Court held that in order to avoid more favorable treatment of state banks that national banks, the consent provided by section 5219 for state taxation of national bank shares, regardless of federal securities held by the bank, must apply also to state taxation of state bank shares.

These decisions demonstrate that before the 1959 amendment to section 3701, the state's authority to impose taxes on the shares of both state and national banks, valued according to the bank's assets without deducting federal securities, rested on the congressional consent provided by section 5219 as well as on the distinction between ownership of bank shares and bank assets. Therefore, we must take into consideration the language and purpose of both section 3701 and section 5219 in assessing the validity of the argument that the amendment to section 3701 changed the *Van Allen* rule. *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974). When the two statutes are read together, we find no irreconcilable conflict between the two. There can be no conflict in view of the initial words of section 3701, "Except as otherwise provided by law," which remained in the statute as before the amendment. This express exception obviates any difficulty that might otherwise exist in reconciling the provisions of section 5219 with the 1959 amendment to section 3701. The consent provided by section 5219 is "otherwise provided by law," and, therefore, falls within the exception to the exemption.

The original exception in section 3701 is not repealed or modified by the 1959 amendment, although other exceptions, not "otherwise provided by law," were added. One of these exceptions applies to corporate franchise taxes. Before the amendment, the exemption had been held not to apply to a tax imposed on a corporate franchise for the privilege of doing business in corporate form, though the tax was based on corporate assets (or income) without deducting federal securities (or the interest therefrom). *Educational Films Corp. v. Ward,* 282 U.S. 379 (1931); *Home Ins. Co. v. New York,* 134 U.S. 594 (1890). There was some inconsistency in the decisions on this point, however. *See Macallen Co. v. Massachusetts,* 279 U.S. 620 (1929); Comment, *Share Tax, Franchise Tax and Federal Banks —*

The Schuylkill Trust Co. Case, 84 Pa. L. Rev. 758, 764-66 (1936). The 1959 amendment to section 3701 cleared up this inconsistency by providing a specific exception for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations." It also provided a specific exception for estate and inheritance taxes, which, by similar reasoning, are imposed on the privilege of succession rather than on the property passing. *See West v. Oklahoma Tax Commission,* 334 U.S. 717, 727 (1948); *Billings v. Illinois,* 188 U.S. 97 (1903); *Cahn v. Calvert,* 159 Tex. 385, 321 S.W.2d 869, 872 (1959). In neither case, however, had such an exception been established on the basis of another federal statute, as in the case of bank shares, and consequently, such taxes were not clearly embraced within the express exception provided by the original exemption statute. There was no need to add another specific exception for taxes on bank shares because that subject was "otherwise provided by law," within the original exception, which is clearly broad enough to cover such taxes with respect to national bank shares.

If the 1959 amendment does not withdraw congressional consent to the taxation of national bank shares in view of the express consent still provided by section 5219, neither can it reasonably be construed as negating the implication of congressional consent to the taxation of shares in state banks established in *Lander.* The clear intent of section 5219 is to prohibit more favorable treatment of state banks than of national banks. *See Montana Nat'l Bank v. Yellowstone County,* 276 U.S. 499, 504 (1928); *Merchants' Nat'l Bank v. City of Richmond,* 256 U.S. 635, 638-40 (1921); *Mercantile Nat'l Bank v. New York,* 121 U.S. 138 (1887). Consequently, state taxation of state bank shares, as well as of national bank shares, falls within the original exception to the exemption provided by section 3701.

The same conclusion follows without consideration of the express exception. In the absence of that exception, it might be contended that there is a conflict between the 1959 amendment and the provisions of section 5219 consenting to state taxation of bank shares. Such an apparent conflict, however, would not render section 5219 ineffective because of the well-known principle that repeals by implication are not favored. This principle applies to federal statutes as well as state statutes, so that when acts of Congress are in apparent conflict, it is the duty of the courts to regard each as effective in the absence of a clearly expressed congressional intent to the contrary. *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133-34 (1974); *Morton v. Mancari*, 417 U.S. 535, 548 (1974). On this principle both section 5219 and the 1959 amendment can be given effect by construing section 5219 as a specific statute with respect to state taxation of bank shares and, therefore, as prevailing as against the more general exemption of federal securities provided by section 3701. This construction is in accordance with the rule that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 1753 (1980); *Morton v. Mancari, supra; Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). The effect of regarding the more specific statute as controlling is to interpret the provisions of the specific statute as an exception to the general statute. *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 198 S.W.2d 879, 881 (1947); *Sheffield v. State*, 307 S.W.2d 100, 104 (Tex. Crim. App. 1957); *Hallum v. Texas Liquor Control Board*, 166 S.W.2d 175, 177 (Tex. Civ. App.—Dallas 1942, writ ref'd).

The theory underlying this rule is explained in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-56 (1976), which involved a question similar to that now before us.

A national bank was sued for violation of the Securities Exchange Act, which provided that suit may be brought in any district where the violation occurred. The bank contended that venue of the suit was governed by a provision of the earlier National Bank Act, which provided that suit against a national bank "may be brought in the district in which such association may be established." The Supreme Court agreed that the earlier statute was controlling and that its more specific venue provision applying to national banks was not repealed by implication. The opinion of Justice Stewart states principles directly applicable to the present case:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' *Morton v. Mancari,* 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). 426 U.S. at 153.

The Court went on to say that when Congress enacted the National Bank Act, it was focusing on the particular

problems of suits against banks, but that when it enacted the general provisions of the Securities Exchange Act, seventy years later, its focus was on the "broad universe of potential defendants subject to that Act." Consequently, under the principle of statutory construction previously stated, the Court held that in the absence of a "clear intention otherwise," the specific venue provision of the earlier National Bank Act controlled. *Id.* at 154.

By similar reasoning in the present case, it is apparent that when Congress enacted section 5219, it was focusing on the particular question of the taxation of bank shares, but when it amended section 3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest, from state and local taxation. Since there is no clear intention manifested by the amendment to extend the exemption to bank shares to the extent of the bank's holdings of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by section 5219.

This conclusion is confirmed by the legislative history of the 1959 amendment, which, though not the controlling evidence of legislative intent, indicates that the purpose of the Congress was to clarify and codify existing interpretations of the exemption rather than to abolish the distinction between a tax on bank shares and a tax on securities held by the bank. The Supreme Court has frequently resorted to committee reports and other legislative history to determine the purpose of statutes which, on their face, appeared no more doubtful than the statute now before us. *See, e.g., United Steelworkers v. Weber,* 443 U.S. 193, 201 (1979); *Muniz v. Hoffman,* 422 U.S. 454, 469 (1975); *United Housing Foundation v. Forman,* 421 U.S. 837, 849 (1975); *Philbrook v. Glodgett,* 421 U.S. 707, 714 (1975); *United States v. American Trucking Ass'n,* 310 U.S. 534, 543-44 (1940).

The legislative history of the 1959 amendment to article 3701 strongly indicates that Congress had no intention to withdraw the consent to state taxation of bank shares provided by section 5219. The amendment was included as section 105 in a bill designated as H.R. 9035, 86th Cong., 1st Sess. (1959), which raised the ceiling on the interest rates on series E and H United States Savings Bonds and made changes in other aspects of debt management. The House Committee on Ways and Means and the Senate Committee on Finance made identical reports to their respective houses concerning H.R. 9035. H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959), S.Rep. No. 909, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News 2769. In these reports the "Summary of Bill" contains the following statement:

> Fourth, the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes. *Id.*

No further reference to section 105 appears in the summary. The "General Statement" included in both of these reports contains the following:

> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. *The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear* that the exemption for Federal obligations extends to every form

> of taxation that would require either the obligation, *or the interest on it,* or both, to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other non-discriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. [Emphasis added.] *Id.* at 2773.

It is noteworthy that the committee reports do not refer to the line of cases beginning with *Van Allen,* although they do refer to decisions holding interest on federal securities to be exempt and state that this interpretation is made explicit by the amendment. It seems highly unlikely that the reporting committees or either house of the Congress intended, by accepting these reports and enacting the proposed legislation, to abolish a distinction which had been well established by Supreme Court decisions and which had been characterized by the Supreme Court as one so "inextricably mixed with all taxing systems" that it "cannot be disregarded without bringing them into confusion which would be little short of chaos." *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907). This legislative history, therefore, confirms our conclusion that the purpose of Congress was to preserve, rather than expand, what the Supreme Court had construed to be the constitutional principle embodied in section 3701. *See Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). Consequently, we hold that the county's tax plan is not illegal because of its failure to deduct the federal securities held by the bank from its net assets in determining the value of its shares.

Discrimination Against Federal Securities

The bank and its shareholders also attack the validity of the county's method of assessing the bank's shares for taxation on the ground that it discriminates against United States obligations as an investment for banks. In an argument supporting this contention, *amici curiae* appearing on behalf of various banking associations assert that this discrimination consists of deducting the assessed value of the bank's real estate in computing the value of the shares without a similar deduction of obligations of the federal government held by the bank. They insist that the tax on bank shares imposed by article 7166 is unconstitutional because it is levied on the difference between the actual cash values of each share and the proportionate amount per share at which the bank's real estate is assessed for taxation. This discrimination, they argue, makes real estate a more attractive investment for the bank than federal securities and, therefore, is an unlawful interference with the federal government's power to borrow money, citing *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935).

We do not agree that the tax is an unlawful discrimination against federal securities. Article 7166 does not exempt the bank's real estate from taxation, but rather requires the bank to render it for taxation separately. In *Schuylkill,* by contrast, the trust company paid no tax on certain securities which were deducted from its assets in computing the tax on its shares because those securities were exempt from taxation. *Schuylkill* holds that to deduct other exempt securities from the bank's assets without deducting also federal securities in computing a tax on the company's shares unlawfully discriminates against federal securities.[6]

[6]The *Schuylkill* opinion shows that some of the securities exempted by the Pennsylvania statute were shares in corporations which had paid a tax on their capital analogous to the Texas franchise tax. The Court evidently treated these shares like other

No such discrimination is shown in this case.

JUDGMENT

For the reasons stated, our former opinion is withdrawn, the appellees' motion for rehearing is granted, and appellants' motion for rehearing is overruled. Accordingly, the judgment of the trial court is affirmed.

CLARENCE A. GUITTARD
Chief Justice

Justices Akin and Robertson concur and join in this opinion.

CONCURRING OPINION BY JUSTICE ROBERTSON
JANUARY 23, 1981

On submission of this case and in the original briefs filed by appellees, section 5219 of the Revised Statutes of the United States was not called to our attention and argued as authorizing taxation such as that here involved. Consequently, that statute was not considered by this court in its original deliberations or opinion. In their motion for rehear-

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exempt shares because the corporations holding them paid no tax. This interpretation of the *Schuylkill* opinion is confirmed by the opinion on the subsequent appeal of that case, *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 (1938). Mr. Justice Roberts, again speaking for the Court, explained his opinion on the earlier appeal as holding "that the exclusion from the base of a proportion of the *tax-exempt* shares of Pennsylvania corporations and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter." (Emphasis added.) This treatment of both classes of shares as exempt from tax, so far as the share-holding corporation is concerned, is consistent with the distinction in *Van Allen*, between a tax on a corporation and a tax on its shareholders, which the first *Schuylkill* opinion expressly recognized and reaffirmed.

ing appellees now, for the first time, raise the consent statute in support of the interpretation they argued for in their original briefs. This argument places the case in a posture entirely distinct from the position in which it was originally presented to this court.

In our original opinion we relied heavily on *Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (Mont. 1978). Apparently, the argument now urged by appellees was not presented to that court either, although it did cite section 5219 (12 U.S.C. § 548) for another proposition. This being so, we must assume that the argument now advanced by appellees was not called to the attention of the Montana court in the form in which it is here argued and thus the argument with which we are presented was not considered by that court.

In *any* case, it is the function of this court, as a representative of the people it serves, to strive for a just resolution of disputes under the law. In *this* case, we are compelled, both legally and morally, to apply the law as enacted by the Congress and as interpreted by our Supreme Court. Anything less would be a breach of that sacred trust invested in us by those we represent.

In view of the foregoing, I concur in the opinion of the Chief Justice affirming the judgment of the lower court.

TED Z. ROBERTSON
Associate Justice

OPINION ON APPELLANTS' MOTION FOR REHEARING

May 1, 1981

The principal point made in the motion for rehearing is that since the express consent to state taxation of bank

shares formerly contained in section 5219 of the Revised Statutes, 12 U.S.C. § 548 (1964), was deleted by the sweeping revision of that section in 1969, there is no longer any congressional consent to taxation of bank shares which can be recognized as an exception to the exemption of federal securities in section 3701 of the Revised Statutes, 31 U.S.C. § 742 (1976). The 1969 revision deletes provisions specifically authorizing certain taxes on national banks and their shareholders and provides simply that a national bank shall be treated as a bank organized under the law of the state where its principal office is located. 12 U.S.C. § 548 (1976).

This argument may be plausible if only the current language of sections 5219 and 3701 is considered apart from the history of these two statutes. Nevertheless, since the revision of section 5219 does not expressly mention taxation of federal securities, the problem is one of construction, and we cannot properly determine the intent of these sections without reference to that history. Since we have concluded, for the reasons stated in our prior opinion, that the 1959 amendment to section 3701 was not intended to extend the tax exemption of federal securities to shares in banks holding federal securities, the question then becomes whether the 1969 revision of section 5219 was intended to have that effect. In considering this question, we are mindful of the rule that tax exemptions are strictly construed against the party asserting the exemption. *Conference of Major Religious Superiors of Women, Inc.* v. *District of Columbia,* 348 F.2d 783, 785 (D.C. Cir. 1965); *Lutkins v. United States,* 312 F.2d 803, 805 (Ct. Cl. 1963).

Our study of the 1969 revision of section 5219 and its legislative history gives no support to the contention that it was intended to extend the exemption so as to restrict the taxation of bank shares. That revision was made by

Public Law 91-156. Act of Dec. 24, 1969, Pub. L. No. 91-156, §§ 1(a), 2(a), 83 Stat. 434. We have examined the proceedings in Congress at the time Public Law 91-156 was under consideration. Cong. Rec. 35399 (November 21, 1969), 38634 (December 12, 1969); 1969 U.S. Code Cong. & Ad. News 1597. Public Law 91-156 delayed final application of the revised section 5219 for two years and provided for that period a temporary amendment by the terms of which the states' authority to tax national banks was broadened to include sales taxes and documentary-stamp taxes, but continued the authority to levy the taxes previously authorized, including bank-share taxes. Public Law 91-156 also directs the board of governors of the Federal Reserve System to make a study of the probable impact on the banking system and other economic effects of the permanent revision. Pursuant to these directions, the board prepared an extensive report to the Committee on Banking, Housing and Urban Affairs of the United States Senate, entitled STATE AND LOCAL TAXATION OF BANKS. Board of Governors of Federal Reserve System, — 92d Cong., 2d Sess., REPORT ON STATE AND LOCAL TAXATION OF BANKS (Comm. Print 1972) (hereinafter cited as STATE AND LOCAL TAXATION OF BANKS). This report reviews the various amendments to section 5219 and confirms the impression stated in our prior opinion that the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 9, 24.

According to this report, the intent of Public Law 91-156 to broaden rather than restrict state authority is shown by the fact that its enactment was precipitated by two restrictive decisions of the Supreme Court, *First Agricultural Nat'l Bank v. State Tax Commission,* 392 U.S. 339 (1968), and *Dickinson v. First Nat'l Bank,* 393 U.S. 409 (1969),

which invalidated state sales and use taxes and state documentary-stamp taxes with respect to national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 336. Both the temporary amendment and the permanent revision of section 5219 authorized such taxes. The purpose of the temporary amendment was not to permit the states to find additional sources of revenue in lieu of taxes that would no longer be available, as suggested in the motion for rehearing. Its purposes, rather, were (1) to require the states to enact affirmative legislation if they desired to extend their general taxing statutes to national banks that had previously been exempt from such taxation because of the restrictions in section 5219, (2) to give the states an opportunity to amend statutes that had previously been tied textually to specific authorizations in section 5219, and (3) to continue the prohibition of state and local taxes on intangible property of national banks until the probable impact of such taxes could be studied by the board of governors of the Federal Reserve System. *Id.* at 312-18.

Reviewing the history of bank share taxes, the report recognizes the *Van Allen* rule that such taxes are levied on shareholders rather than on the banks, *id.* at 44, 231-234, 382-395, and also recognizes that in view of large holdings of federal securities by national banks, allowance of deductions for federal securities held by the banks would have the effect of nullifying all share taxes. *Id.* at 233. The report mentions the 1959 amendment to section 3701, 31 U.S.C. § 742 (1976), and proposes modification of the exemption of interest on federal securities. The discussion assumes that the existing exemption of such securities from property taxation would continue. *Id.* at 66, 67. The report gives no indication that either the 1959 amendment to section 3701 or the 1969 revision of section 5219 had any effect, separately or together, on the taxation of bank shares as previously recognized under the *Van Allen* rule.

In Public Law 91-156, Congress recognized the legality of bank shares taxes by continuing the authority of the states to impose these taxes in the temporary amendment, which retains the existing provisions authorizing states to impose certain taxes on national banks, including bank share taxes, and adds authority to impose certain specified additional taxes before the permanent revision takes effect. This continuation would have been pointless if the effectiveness of bank share taxes had been nullified by the 1959 amendment to section 3701. 31 U.S.C. § 742 (1976). That it was not pointless is demonstrated by statistical tables in the report, which show that in 1969-70 bank share taxes were in force in twenty-seven states and formed a substantial portion of the taxes paid by national and state banks at that time. *Id.* at 17, 386-88. Thus, it appears that abrogation of the *Van Allen* rule in 1969 would have had a substantial impact, which is not mentioned in the report.

It is most unlikely that this impact would have been overlooked if the 1969 revision had had the effect of withdrawing previous congressional consent to state taxation of the full shareholder interest in national bank shares as previously provided in section 5219, because Congress in 1969, as well as in earlier years, was sensitive to both the interests of the banking industry and the revenue needs of the state and local governments, as both the text of Public Law 91-156 and the report of the board of governors demonstrate. There is no evidence, however, in any legislative history that Congress considered either in 1959 or 1969 the economic impact of abrogation of the *Van Allen* rule, which the supreme court had previously recognized as one that could not be disregarded without bringing state and local taxing systems into confusion little short of chaos. *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907).

In the present case, the banks and their shareholders recognize in their motion for rehearing that the *Van Allen* rule originally rested on two grounds, (1) the distinction between taxation of shares and taxation of bank assets, and (2) congressional consent to state taxation of bank shares, as expressed in section 5219. Each of these grounds was sufficient in itself to uphold the validity of bank share taxes without any deduction for federal securities held by the banks. Neither the 1959 amendment to section 3701 nor the 1969 revision to section 5219 expressly abolishes this rule. The 1959 amendment does not affect the consent ground. Neither does the 1969 revision of section 5219 abrogate the *Van Allen* rule because its sweeping language clearly broadens rather than restricts the states' authority to levy taxes by giving them authority to treat national banks the same as state banks. If national banks must be treated the same as state banks, then shareholders in national banks must be treated the same as shareholders in state banks. Since the power of the states to tax the shares of state banks does not depend on congressional consent, except to the extent that federal securities may be involved, the *Van Allen* rule, previously applicable to state banks and their shareholders under the *Lander* decision, was continued by the 1969 revision with respect to national banks and their shareholders, whatever its original basis may have been. To hold that Congress intended by the 1969 revision to withdraw its consent to state taxation of bank shares to the extent of federal securities held by the banks is neither required by the language of Public Law 91-156, nor by any reasonable interpretation of that law in the light of its legislative history. Such a holding would be contrary to the principle above stated that tax exemptions are strictly construed against the party asserting the exemption. Consequently, we adhere to our opinion that the county properly assessed the tax on the shares of stock in question without

any allowance or deduction for federal securities held by the bank.

Appellants' motion for rehearing is overruled.

CLARENCE A. GUITTARD
Chief Justice

PUBLISH

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

Friday, January 23, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, John Childs, et al, have recover of and from the appellant, Bank of Texas, and from Troy R. Smith, Jr. and Brenda Maiden their sureties on appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Friday, May 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-451, BANK OF TEXAS ET AL, v. JOHN CHILDS, ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

CHRONOLOGICAL LIST OF IMPORTANT DATES IN CASE NO. 20659

Date	Filing, Hearing, or Court Action
September 5, 1979	Plaintiffs' Petition Filed
June 30, 1980	Plaintiffs' Motion for Summary Judgment Filed
July 11, 1980	Defendants' Motion for Summary Judgment Filed
August 8, 1980	Summary Judgment Entered by Trial Court
September 12, 1980	Appeal Perfected to Dallas Court of Civil Appeals
November 7, 1980	Judgment Entered by Dallas Court of Civil Appeals
November 24, 1980	Motion for Rehearing Filed
January 23, 1981	Motion for Rehearing Granted and New Judgment Entered by Dallas Court of Civil Appeals
February 9, 1981	Motion for Rehearing Filed
May 1, 1981	Motion for Rehearing Denied by Dallas Court of Civil Appeals
June 1, 1981	Application for Writ of Error Filed
January 6, 1982	Application of Writ of Error Denied by Texas Supreme Court
March 17, 1982	Petition for Writ of Certiorari Filed
November 1, 1982	Writ of Certiorari Granted

[Tr. 29]

No. 79-9339-A

In The District Court
14th Judicial District
Dallas County, Texas

Wynnewood Bank & Trust, et al
vs.
John Childs, et al

MOTION FOR SUMMARY JUDGMENT

To the Honorable Court:

Plaintiffs, Wynnewood Bank & Trust, Herb Brown, et al, move the Court pursuant to Rule 166-A(a) of the Texas Rules of Civil Procedure for summary judgment on the whole case against all Defendants, John Childs, et al, on the grounds that the pleadings and depositions on file show that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as per their petition as a matter of law. In support of this Motion for Summary Judgment, Plaintiffs show the Court the following:

I.

It is Plaintiffs' position that this is a Summary Judgment case in that there are no disputed issues of fact and that the only issues are matters of law. Plaintiffs maintain as follows:

(A) That this action for a writ of mandamus, a temporary restraining order, and a temporary and permanent injunction is a direct attack upon the taxing

scheme for the County of Dallas;

(B) That the cause of action was filed September 5, 1979, before the final certification of the tax plan by the Defendants on September 17, 1979, and later implementation thereof;

(C) That the proposed tax plan is in violation of statute, both state and federal, and that the approval of such plan as to these Plaintiffs results in irreparable harm to these Plaintiffs.

1. *State Law.*

a. That the tax plan violates Article 7150.6, Tex.Rev. Civ.Stat., in that Article 7150.6 provides for the [Tr. 30] taxation of intangible property including stock *only if* it is provided by Article 7166, Tex.Rev.Civ. Stat.

b. That Article 7166, Tex.Rev.Civ.Stat., provides for the taxation of bank stock *only if* the tax rate assessed against bank stock is no greater than is assessed against other moneyed capital in the hands of individuals.

c. That moneyed capital in the hands of individuals is no longer taxed in Texas under the new Truth in Taxation Law, Article 7150.6, Tex.Rev.Civ.Stat.

d. That but for the temporary restraining order against Defendants, the 1979 Dallas County tax plan would have been put into effect and resulted in the taxing of Plaintiffs' stock at $.064 per share, i.e., $.064 tax more per share than other moneyed capital in the hands of individuals.

2. *Federal Law.*

a. That moreover, 31 U.S.C., § 742, provides that no state may tax U. S. Government obligations directly or indirectly.

b. That to ascertain the assessed value of the Plaintiffs' bank's stock, U. S. Treasury notes, bills and bonds are included in the calculations.

c. That if the U. S. Treasury notes, bills and bonds were excluded from the assets of the bank, the assessed value of a share of stock would be a negative amount.

3. *Damages.* That but for this Court's entry of its temporary restraining order, Plaintiffs would be factually damaged in at least two ways:

a. Defendants' tax plan would have certified and implemented as to these Plaintiffs, and Plaintiffs would have had to prove the dollar amount of increased taxes they would bear under this illegal tax, a process, which at a minimum, would include additional legal expense and expert testimony;

b. That Plaintiffs would have to pay taxes which are not statutorily authorized in violation of the Supremacy Clause of the U. S. Constitution, Article VI, and the Texas Constitution, Article VIII, § 1.

[Tr. 31] The following are the undisputed facts, established as a matter of law as reflected in the authorities cited herein, and pertinent law upon which this Motion relies:

1. *Direct Plan Attack on Tax Plan.*

a. The Board of Equalization made first approval of all property subject to taxation on July 30, 1979. Deposition and exhibits attached thereto of John Childs filed December 17, 1979, page 72, Defendants' Exhibit 1 (hereinafter cited as John Childs' Deposition, page , exhibit).

This is the first approval of the tax roll provided pursuant to Article 7206(4), Tex.Rev.Civ.Stat., which provides as follows:

> "4. After they [commissioner's court sitting as a Board of Equalization] have inspected and equalized as nearly as possible, they shall approve said lists or books and return same to the assessors for making up the general rolls, *when said board shall meet again and approve the same if same be found correct.*" (Emphasis added).

b. County Commissioners made tax levies on August 13, 1979. John Childs' Deposition, Plaintiffs' Exhibit 2.

c.(1) On September 5, 1979, this cause of action was filed for a Writ of Mandamus, ordering "the Defendant Tax Assessor-Collector of the County of Dallas, Texas:

> (i) To adopt a policy and plan of taxation assessing all monied capital including bank stock in the hands of individuals within the county upon a uniform and equal basis;
>
> (ii) To subtract the value of United States Government obligations held by Wynnewood Bank & Trust from the capital of the bank in determining the fair market value of the shares of the bank held by its shareholders,"

and further seeking injunction relief, both temporary and permanent, "restraining and enjoining Defendants, their agents, servants and employees from directly or indirectly enforcing or attempting to enforce the aforesaid assessments [assessment of the Plaintiff Bank's stock] and the collection of taxes on said assessments:

> [Tr. 32] (i) Approving the tax plan for the County tax year of 1979, either generally or as it applies to Plaintiffs;
>
> (ii) Issuing tax notices or statements to Plaintiffs;

(iii) Attempting to collect taxes either generally or from Plaintiffs or any member of the class based upon the illegal scheme and plan or taxation employed or threatened to be employed by the Defendants;

(iv) Using their present illegal taxing plan to establish property values county-wide and as a basis to levy taxes against Plaintiff's property;

(v) Doing any act which is designed or calculated to persuade, order or induce Plaintiffs to accept improper valuations, all as set forth above;"

(2) On September 5, 1979, a temporary restraining order was issued by this Court restraining Defendants from acting as set forth above.

(3) On September 5, 1979, the parties stipulated that such restraining order be in full force and effect through November 30, 1979.

(4) On November 21, 1979, the parties stipulated that such restraining order be in full force and effect through the date set for the trial of Plaintiffs' application for a temporary injunction.

d. The County Commissioner's Court certified the tax roll September 17, 1979. John Childs' Deposition, Plaintiffs' Exhibit 3, dated September 17, 1979; and Exhibit 4 dated September 17, 1979, signed by all Commissioners and John Childs filed of record October 24, 1979, in Volume 246, Page 339 of the Records of Dallas County, Texas.

This is the reapproval of the tax roll with corrections contemplated pursuant to Art. 7206(4), Tex. Rev. Civ. Stat., supra. Such procedure for fixing liability and certification is in keeping with the holding in *Crocker vs. Santo Consol.*

I.S.D., 116 S.W.2d 750 (Tex. Civ. App. — Eastland 1939). In the *Crocker* case, supra, it is said:

> It was necessary for the assessment lists in order to constitute assessments to be approved by a board of equalization. *Chisholm vs. Adams*, 71 Tex. 678, 10 S.W.336. . . . When after legal levy such assessment lists are corrected and approved by the board of equalization, the liability of a taxpayer is thereby fixed.

[Tr. 33] The Bank maintains that, as a matter of law, the tax plan is not in effect and no liability can attach to any taxpayer until this final approval of the tax rolls. In the present case, this final step of correction, approval and verification by affidavit of the tax assessor[1] and board of equalization, i.e., certification, took place on September 17, 1979, when the rolls were signed by the Defendants and verified, i.e., certified. Only after such verification was the tax plan implemented.

When asked under direct examination:

> ". . . What shall we call the September 17, 1979 order," John Childs responded: "I think a good word would just be certifying the tax roll dollar amounts generated." John Childs' Deposition, page 24.

Also, Exhibit 4 to the Deposition of John Childs, signed by Defendants on September 17, 1979, is the only final approval of the correct values by the County Commissioners signing as a board of equalization.

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[1]Technically speaking, the tax rolls were never properly certified because John Childs signed the roll in blank prior to the Commissioner's Court meeting September 17, 1979, because he was out of the city. There is no evidence that John Childs ever ratified such notarization. John Childs' Deposition, page 31.

2. *The Tax Plan.*

a. The tax rate was $1.99 on each $100.00 worth of property situated in Dallas County, Texas, by Order No. 79-1206, of the Commissioner's Court, August 13, 1979. John Childs' Deposition, Plaintiff's Exhibit 2. The rate was allocated as follows: $0.10 state tax, $.85 county tax, $.75 hospital tax, and $.29 college tax.

b. The Plaintiff Bank's assessment was $1,226,210.00 for 1979. Deposition of Emmett Lee Frier, filed February 29, 1980, pp. 48-50, and Exhibits 5, 8, and 9 (hereinafter cited as Emmett Frier's Deposition, page , exhibit).

c. According to these facts and simple mathematical calculations, the Plaintiff Bank's stock would have been taxed **[Tr. 34]** $24,401.57 on 377766.25 shares of stock or $.064 per share calculated as follows:

$$\frac{1.99}{100.00} = \frac{x}{1,226,210.00}$$

$$100x = 2440157.9$$

$$x = 24,401.57 \text{ tax liability}$$

$$\frac{24,401.57}{377766.25} = \$.064 \text{ tax per share}$$

The Plaintiffs would ask the Court to take judicial notice of these calculations in that all the facts are set out in the depositions on file and the mathematical calculations are subject to judicial notice. *Levlon vs. Dallas Ry. & Terminal Co.*, 117 S.W.2d 876 at 878 (Tex. Civ. App. — Dallas 1938), error refused as cited in Texas Practice — Law of Evidence, § 202.

3. *Bank Stock Taxation — Violation of State Law.*

a. Article VIII, § 1 of the Texas Constitution, provides for the taxation of property. It reads as follows:

§ 1. Equality and uniformity; tax in proportion to value; occupational taxes; income tax; exemption of household goods and personal property homestead

Section 1. Taxation shall be equal and uniform. All real property and tangible personal property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. *The Legislature may provide for the taxation of intangible property and may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State.* It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax. The Legislature by general law shall exempt household goods not held or used for the production of income and personal effects not held or used for the production of income, and the Legislature by general law may exempt all or part of the personal property homestead of a family or single adult, "personal property homestead" meaning that personal property exempt by law from forced sale for debt, from ad valorem taxation. The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business. [Emphasis added].

[Tr. 35] b. Article 7150.6, Tex. Rev. Civ. Stat., provides:

Art. 7150.6. Exemption of intangible property

(a) Except as provided by Subsection (b) of this article, *intangible property is exempt* from ad valorem taxation.

(b) *Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166,* or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes); by Article 4.01, Insurance Code, as amended; by Chapter 194, Acts of the 60th Legislature, Regular Session, 1967 (Article 7244a, Vernon's Texas Civil Statutes); or by Chapter 358, Acts of the 54th Legislature, 1955 (Art. 7105a, Vernon's Texas Civil Statutes).

(c) For purposes of this article, "intangible property" means a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise preceived by the senses, although its existence may be evidenced by a document. It includes a *stock,* bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share deposit account, insurance policy, disability or retirement benefit, cause of action, contract, and goodwill. [Emphasis added].

c. Article 7166, Tex.Rev.Civ.Stat., is Defendants' statutory authority for the taxation of the Plaintiff Bank's real property and stock. John Childs' Deposition, pp. 56-57. Article 7166, Tex.Rev.Civ.Stat., provides as follows:

Art. 7166. Assessment of real estate by banks

Every banking corporation, State or national, doing business in this State shall, in the city or town in which

it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the **[Tr. 36]** payment of his taxes upon the same. *Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.* Acts 1885, p. 106; G.L. vol. 9, p. 726. [Emphasis added].

There are two key points to consider when analyzing these three statutes. First, the people of the State of Texas recently authorized the Legislature to "provide for the taxation of intangible property . . . both upon natural persons and upon corporations, other than municipal, doing

any business in this State," when Article VIII, § 1, Tax Const., quoted, supra, was approved November 7, 1978. Pursuant to such authority, the Legislature adopted the so-called Truth in Taxation bill which includes Article 7150.6, Tex.Rev.Civ.Stat., quoted, supra. In essence, all intangible property is exempt from taxation unless it is provided under Article 7166 or other listed statutes. Upon review of the other listed statutes, only Article 7166 is a tax upon individuals; all other statutes refer to businesses such as common carriers, railroads, insurance companies and banks. Thus, although authorized to tax an individual's intangible personal property, the Legislature has chosen to tax only business intangible property.

Even more important, in study of Article 7166, it is apparent that bank stock is not taxable. Article 7150.6 provides for taxation of intangible personal property including stock "if" its taxation is provided by Article 7166. Article 7166 provides: "Nothing herein shall be so construed as to tax national or state banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals." Thus, the proviso takes bank stock out of the tax scheme if moneyed capital in the hands of individuals is not taxed.

d. Moneyed capital in the hands of individuals other than bank stock is not taxed in Dallas County according to the testimony of John Childs.

> Q. Look at the last sentence of Article 7166, sir, and would you please read that into the record?
>
> [Tr. 37] A. "Nothing herein shall be construed as to tax national or state bank or the shareholder thereof, at a greater rate than is assessed against other moneyed capitals in the hand of individuals."

Q. All right, sir. Do you assess moneyed capital in the hands of individuals?

A. No, sir.

Q. But you do assess moneyed capital in the hands of a bank?

A. Shares of stock, yes.

Q. All right. Based on the fact that you don't assess moneyed capital in the hands of individuals, then, what statutory authority are you utilizing to tax moneyed capital in the hands of the bank, which are the bank shares?

A. I don't have any discovery law to find out what the moneyed capital of an individual is. I have no way of obtaining it.

Q. Well, do you ever make an inquiry as to what a person's moneyed capital is in the hands of an individual?

A. You mean to the bank?

Q. Well, to anybody.

A. We have not, no, sir.

Q. Other than that reason, is there any other reason that you don't assess moneyed capitals?

A. No, sir.

Q. Is it just sort of by tradition, that is the best way to put it? I'm not trying to put words in your mouth.

A. It's never been assessed, to my knowledge, in Dallas County.

Q. And how long have you been county tax assessor?

> A. I'm in my second term, seven years. Been in the tax office twenty-nine.

John Childs' Deposition, pp. 60-61. Consequently, John Childs has no authority for the taxation of bank shareholder on their bank stock. There is no question that real estate of a bank is taxable, but no stock is taxable to the individual shareholder or bank. Simply stated, any taxation of bank stock is illegal unless other moneyed capital is taxed at the same rate.

[Tr. 38] The Dallas Court of Civil Appeals recently considered Article 7166, Tex.Rev.Civ.Stat., in *Childs* vs. *Reunion Bank,* 587 S.W.2d 466 (Tex.Civ.App. — Dallas 1979) ref. n.r.e. As in the present case, Defendant Childs testified that no other moneyed capital in the hands of individuals was taxed in Dallas County. The Court in holding the tax plan illegal and granting Reunion Bank a permanent injunction against taxation of its bank stock for 1977 and 1978 held,

> A tax scheme that levies against only one type of moneyed capitl[sic], bank stock, while not levying against any other moneyed capital in the hands of individuals is in obvious violation of Article 7166. We hold, therefore, that, the taxpayers sustained their burden to show that the taxing scheme was illegal.

Reunion Bank vs. *Childs,* 587 S.W.2d 466, at 470 (Tex.Civ. App. — Dallas 1979) ref. n.r.e.

Plaintiffs would ask the Court's judgment on this point and on the whole case as a matter of law. Without further proof, Defendants' implementation of any tax plan resulting in taxation of Plaintiffs' stock is illegal and Plaintiffs are entitled to mandamus and injunctive relief.

4. *Bank Stock Taxation — Violation of Federal Law.*

a. In computing the assessed value of Plaintiffs' Bank stock or any state bank stock, the assessor takes the entire capital account, surplus and undivided profits and subtracts the real estate; then, the 35% assessment for Dallas County is applied; and the total assessment is determined. Emmett Frier Deposition, pages 37-49. Under direct examination, Emmett Frier testified as follows:

> Q So Plaintiffs' Exhibits Number 8 and 9 are the back up to Plaintiffs' Exhibit Number 5, correct, sir, with regard to the Wynnewood Bank and Trust Company?
>
> A Yes, sir.
>
> Q Whereby you arrived at a $1,226,210.00 evaluation?
>
> A Yes, sir.
>
> Q Or assessment I guess you might say. Did you exempt all stocks, bonds, treasury notes and other obligations of the United States when you —
>
> [Tr. 39] A No.
>
> Q — arrived at the $1,226,210.00 assessment of the Wynnewood Bank and Trust Company stock, sir?
>
> A No.

Exhibits 4, 5, 8, 9 and 11 are the back up to Mr. Frier's testimony that the Plaintiff Bank's assessed value is $1,226,210.00. Emmett Frier Deposition. Exhibit 11 even breaks down the various types of U.S. Government obligations included in the Plaintiff Bank's capital account on December 31, 1978, including "U. S. Treasury securities" and "obligations of other U.S. Government agencies and corporations."

Later in his deposition, Mr. Frier testified:

Q Right. And with respect to Plaintiffs' Exhibit 11, I'm having a little trouble reading this but looks like on line two U. S. Treasury securities of three million — would that be 365,000, sir?

A They have an ink mark or something, but that's what it looks like to me, 365,000.

Q And below that obligations of other U. S. Governmental agencies and corporations a $1,900,000.00?

A Yes, sir.

Q And I'll ask you the same question, that's a little over $5,000,000.00 worth of U. S. Treasury securities and other U. S. Government agencies and corporations. If you subtracted those pursuant to the Federal Statute from your reconciliation of awhile ago of the cash value of the bank shares of Wynnewood Bank and Trust Company, you would also be negative and below the line?

A If you subtracted them, yes, sir.

Q And I think you have already testified that they were not?

A Yes, sir.

b. 31 U.S.C., § 742, prescribes:

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, *directly or indirectly,* in the computation of the tax, except nondiscriminatory

franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. [Emphasis added].

[Tr. 40] c. Under 31 U.S.C., § 742, direct or indirect taxation of U.S. Government obligations by states is forbidden.

> "The states have no power by taxation to impede, burden, or in any manner control the operation of the Constitution and laws enacted by Congress to carry into execution the powers vested in the general government. *McCulloch v. Maryland,* 4 Wheat 316, 436, 4th Ed. 579; *Watson v. City Council of Charleston,* 2 Pet. 449, 7 L Ed. 481. Nor can this inhibition upon the states be evaded by any change in the mode or form of taxation, provided the same result is effected; that is, an impediment to the exercise of a power of the United States is thereby interposed. That cannot be accomplished indirectly which cannot be accomplished directly."

City of Waco v. Texas Ins. Co., 248 S.W.315 at p. 318 (Tex. Comm. App., Section B, 1923), opinion adopted by Texas Supreme Court.

The question of state taxation of U.S. Government obligations included in the value of bank stock was recently considered by the Montana Supreme Court. *Montana Bankers Ass'n v. Montana Dept. of Revenue,* 580 P 2d 913 (Mont. 1978). In construing the Montana Bank Shares Tax Act, as it relates to 31 U.S.C. 742, the Montana Court ruled that the value of U. S. Government obligation must be deducted from the bank's statement before a state tax was imposed. The Montana Court reviewed the legislative and judicial history of 31 U.S.C. 742 and concluded:

> The plain language provides an exemption to every form of state taxation that requires United States obligations or interest to be considered directly or indirectly in the computation of the tax. The statute speaks for itself. 580 P 2d at 916.

d. U. S. Government obligations are included in the assessed value of Plaintiff Bank's stock in contravention of 31 U.S.C. 742. The deduction of such obligations results in no tax liability as to these Plaintiffs as provided by law. Such obligations must be deducted from Plaintiffs' capital stock or Defendants have encroached on federal supremacy. Consequently, the Defendants have adopted a tax plan fundamentally in conflict with federal law. On this ground alone, Plaintiffs are entitled to summary judgment against Defendants herein as prayed in their petition.

[Tr. 41] 5. *Mandamus and Injunctive Relief — Burden of Proof.* Two cases are particularly relevant when considering the burden on a taxpayer in seeking relief from the implementation of a fundamentally erroneous and illegal tax plan. *Burklund* vs. *Hackett,* 575 S.W.2d 389 (Tex.Civ.App. — Tyler 1978) no writ and *Childs* vs. *Reunion Bank,* 587 S.W.2d 466 (Tex.Civ.App. — Dallas 1979) ref. n.r.e. Both cases resulted in the granting of an injunction for the taxpayers. As aptly stated by the Tyler court, "The sole question presented to the trial court in a hearing for temporary injunction is whether the applicant is entitled to preservation of the status quo." *Burkland* vs. *Hackett,* supra, at 391. "Where the taxpayer challenges the imposition of taxes upon his property in a direct attack upon a constitutional infirmity and prosecute his suit with diligence, that is all we should require. *Atlantic Richfield Company* vs. *Warren I.S.D.* [453 S.W.2d 190 (Tex.Civ.App. — Beaumont 1970) ref'd n.r.e.] at 196." *Burklund* vs. *Hackett,* supra, at 393.

The Dallas Court explained the standard in a case, such as the one at bar, where an entire class of property was not taxed as follows:

> Whether injunctive relief is sought before or after an assessment plan is put into effect, the taxpayers must show that the plan is illegal. They must also show a likelihood of substantial injury; that is, they must show that the plan would discriminate against them by deliberately assessing their property at a greater percentage of its true value than the percentage assessed for other properties subject to the tax. *City of Arlington* vs. *Cannon,* 153 Tex. 566, 271 S.W.2d 414, 417 (1954); *Lancaster Ind. School Dist.* v. *Pinson,* 510 S.W.2d 380, 383 (Tex.Civ.App. — Dallas 1974, writ ref'd n.r.e.). If the plan wholly excludes some classes of property from the assessment rolls, injury from such a plan may be shown without establishing the market value of the plaintiffs' property. *Lancaster Ind. School Dist.* v. *Pinson,* 510 S.W.2d 380, 383 (Tex. Civ.App. — Dallas 1974, writ ref'd. n.r.e.).

Reunion Bank vs. *Childs,* supra, at 469-70.

Thus, to avail themselves of injunctive relief, the taxpayer must prove (1) the tax plan is illegal; and (2) substantial damage.

In the present case, the tax plan is illegal under state law and under federal law. From the testimony of **[Tr. 42]** Emmett Frier, it is implicit that Plaintiffs' total tax bill would be $24,401.57, or $.064 per share. In this case, where Plaintiffs maintain that no tax is payable, Plaintiffs are damaged to the extent of $.064 per share more than allowed by state and/or federal law. To allow the tax plan to be implemented as to these Plaintiffs would result in these

Plaintiffs being put to the onerous burden of proving the exact excessiveness of the tax, Arlington vs. Cannon, 271 S.W.2d 414, 416-417 (Tex. 1954) and also possible liens and limitations on their stock pursuant to Article 7166, Tex. Rev.Civ.Stat. ". . . The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. . . ." Article 7166, Tex.Rev. Civ.Stat.

Plaintiffs have presented this Court with summary judgment proof which entitles them to the issuance of a writ of mandamus ordering Defendants to implement a tax plan authorized by law and a permanent injunction to prevent the implementation of an illegal tax plan, assessment of improper tax, collection of illegal taxes, and enforcement of liens for taxes due as prayed in Plaintiffs' petition.

6. *Costs of Suit.* As prayed in Plaintiffs' petition, they are entitled to recover the costs of suit from Defendants. "Ordinarily, in the absence of a statute exempting a governmental unit from the payment of court costs, it is liable just as any other litigant." *Reunion Bank* vs. *Childs,* supra, at 471. Therefore, Plaintiffs, as the prevailing party in this Motion for Summary Judgment, are entitled to their costs of suit.

III.

Plaintiffs further move the Court, in the event summary judgment on this case is refused, to ascertain at the hearing on this motion which material facts exist without substantial controversy and which facts are in good faith and according to law **[Tr.43]** controverted, and to thereupon enter an order specifying the facts that appear without substantial controversy and directing such further proceedings in the actions as are just.

WHEREFORE, Plaintiffs request that this matter be set for hearing, with notice to Defendants and that upon hearing, and proper consideration thereof, said motion be in all things granted, and that summary judgment be entered in favor of these Plaintiffs as prayed in their petition against Defendants, for all costs of court, and for such other and further relief to which Plaintiffs may be entitled.

(Signatures omitted in printing)

[Tr. 45]

No. 79-9339-A

In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et al.
v.
John Childs, et al.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

To The Honorable Judge of Said Court:

Comes now Defendants, Dallas County et al., and move the Court pursuant to Rule 166-A(b) of the Texas Rules of Civil Procedure for summary judgment on the whole case against Plaintiffs on the grounds that the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact and that Defendants are entitled to a judgment as a matter of law. In support of this Motion for Summary Judgment, Defendants show the Court as follows:

I.

The Court should grant Defendants' Motion for Summary Judgment herein because as a matter of law the tax plan in question was not arbitrary, illegal or fundamentally erroneous. To prevail, Plaintiffs must show that the tax plan is arbitrary, illegal or fundamentally erroneous. *Burklund v. Hackett,* 575 S.W.2d 389 (Tex.Civ.App. — Tyler 1978 n.w.h.). Further, Defendants herein are entitled to judgment as a matter of law because Plaintiffs' Petition requesting mandamus and injunctive relief was not timely filed and is therefore moot. Finally, Plaintiffs have not, as

a matter of law, shown substantial injury which would entitle them to the relief sought.

II.

STATE LAW

Art. 7166 V.A.T.S. (quoted in full in Plaintiff's Motion for Summary Judgment, p. 7) is the authority for the tax on bank stock which is disputed by Plaintiffs. Plaintiffs make no contention that such statute is unconstitutional or otherwise invalid. Rather, Plaintiffs contend that since no "moneyed capital" other than such stock is taxed, the tax plan violates Art. 7166 by taxing such bank stock "at a greater rate than is assessed against other moneyed capital in the hands of individuals."

[Tr. 46] "Moneyed capital" is not defined by statute in Texas. However, several cases have held that "moneyed capital" is capital which is employed by individuals when the object of their business is the making of a profit by the use of such capital as money — i.e., the banking business. As was stated in *Mercantile Bank vs. New York*, 121 U.S. 138, 7 S.Ct. 826, 30 L.Ed. 895 (1887):

> "But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. . . . neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, which constitutes its invested capital may consist of real and personal property, which, in the hands of individuals, no one would think of calling

moneyed capital, and its business may not consist of any dealing in money or commercial representatives of money.

"So far as the policy of the government in reference to the national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all." (at p. 155-156).

As was further stated in the *Mercantile Bank* case:

"The object of the law was to establish a system of national banking institutions in order to provide a uniform and secure currency for the people . . . it was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the states the authority to tax them within the limits of the rule prescribed in the law. . . . the main purpose, of Congress, of fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state in levying such tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations of a like character. This language of the act . . . is to be read in the light of this policy." (at p. 154-155).

In other words, the purpose of the prohibition of a greater rate of taxation on other "moneyed capital" is to prevent unfair competition with banks.

This prohibition against unfair taxation was extended to State banks in the statutes of Texas, and it was held that the **[Tr. 47]** State statute incorporated the law of the Federal statute. *Primm v. Fort,* 57 S.W. 972 Tex.Civ.App. 1900 writ ref.).

It is this use of the term "moneyed capital" that must be kept in mind when determining whether or not Dallas County taxes any "moneyed capital" in the hands of individuals at a rate greater than that of bank stock. The burden of proof of such fact is upon the Plaintiffs. *Burklund v. Hackett,* 575 S.W.2d 389 (Tex.Civ.App. — Tyler, 1978 n.w.h.).

The only such proof in any manner so far produced by Plaintiffs was in support of their Motion for Summary Judgment — the deposition of John Childs at pages 60-61 wherein Mr. Childs was asked if he assessed "moneyed capital" in the hands of individuals, to which he answered "No, sir." (P.60 L.21). However, at P.64, L.24, when asked his definition of the term "moneyed capital", Mr. Childs answered, "To me, moneyed capital would be what money you have in the bank or an individual has in the bank. It's his assets." Mr. Childs further agreed that "moneyed capital" would just be the cash of an individual.

It is apparent from his answers that Mr. Childs was using a different meaning for the term "moneyed capital" than was contemplated by Art. 7166 as interpreted by the cases cited above. Thus, his testimony constitutes no proof of any taxation by Dallas, County of "moneyed capital" in the hands of individuals other than bank stock at any lesser rate than that of bank stock. Additionally, Mr. Childs, in his affidavit attached hereto and made a part hereof, has specifically denied knowledge of any taxation by Dallas County of taxable property at a lesser rate than bank stock. Such affidavit further states that Dallas County has employed and does employ a tax policy (which is attached to the affidavit and made a part thereof) which cannot be characterized as arbitrary, illegal or fundamentally erroneous.

[Tr. 48] Therefore, Plaintiffs' contention that bank stock is taxed at a greater rate than other "moneyed capital" in the hands of individuals is not supported by any summary judgment proof and must be overruled. It likewise must be overruled because of the absence of proof of the *existence* of any "moneyed capital" in the hands of individuals other than bank stock. For these reasons, there exists no fact issue concerning any violation of State law by Defendants, and summary judgment should be granted to Defendants.

III.

FEDERAL LAW

Plaintiffs contend that the inclusion of United States obligations in the valuation of bank stock is a violation of 31 U.S.C. 742 (quoted in Plaintiffs' Motion for Summary Judgment at p.11). Such a contention flies in the face of over one hundred years of United States Supreme Court decisions. *Van Allen v. Assessors,* 3 Wall. 573, 18 L.Ed. 229 (1866); *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191 (1923); *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 75 S.Ct. 607, 99 L.Ed. 950 (1955). It has been consistently held that in valuing the shares of banks for the purposes of taxation it is not necessary to deduct the value of United States securities held by the bank whose shares are taxed. Mr. Justice Moody, in *Home Savings Bank v. Des Moines,* 205 U.S. 503, 27 S.Ct. 571, 51 L.Ed. 901, succinctly stated the rule:

> "Although the states may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for

the purposes of taxation it is not necessary to deduct the value of national securities held by the corporation whose shares are taxed."

This principle has been followed by the Texas Courts. *Brown v. First National Bank of Corsicana,* 175 S.W. 1122 (Tex.Civ.App. — Dallas 1915, writ ref.).

[Tr. 49] The only authority in point cited by Plaintiffs is *Montana Banks Association v. Montana Dep't. of Revenue,* 580 P.2d 909 (1978). The Montana Court believed that the 1959 amendment to 31 U.S.C. 742 (which added the last sentence of the section) changed previous law and that pre-1959 interpretations of the law were therefore inapplicable.

However, the Legislative history of the 1959 addition makes it clear that no change was intended. Rather, only a clarification of existing law was intended.

"D. *CLARIFYING* EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION.

Present state law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. *It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable income is determined.* The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered

> directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (emphasis added) 1959 U.S. Cong. & Admin. News p. 2773.

As was further stated at p. 2777, "The new sentence makes it clear that the exemption *now provided* . . . extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly, in the computation of the tax. . . ." (emphasis added). The quoted sections make it clear that Congress had no intention of changing the existing law. Plaintiffs have cited no decision other than the *Montana* decision so holding, and it is clear that the Montana Court is in error and should not be followed. As a matter of law, 31 U.S.C. 742 has not been violated and Defendants should be granted summary judgment.

[Tr. 50] Injunctive relief does not lie where the taxpayer is not diligent in availing itself of the remedy. *Childs* v. *Reunion Bank,* 587 S.W.2d 466 (Tex.Civ.App. — Dallas 1979, writ. ref. n.r.e.).

It is undisputed (see Plaintiffs' Motion for Summary Judgment p. 3) that the tax roll was certified by the Board of Equalization on July 30, 1979, and that taxes were levied and the tax rate set on August 13, 1979. It is likewise undisputed that the Plaintiffs' cause of action was not filed until September 5, 1979.

The actions taken on July 30, 1979, and August 13, 1979, by Defendants put the tax plan of Dallas County into effect for the year 1979. *Dallas Joint Stock Land Bank of Dallas* v. *State,* 118 S.W.2d 941 (Tex.Civ.App. — El Paso 1941,

n.w.h.); *Dorman* v. *Ferris Independent School District,* 581 S.W.2d 783 (Tex.Civ.App. — Waco 1979, writ ref. n.r.e.) The tax plan having already taken effect at the time of the filing of Plaintiffs' Original Petition, the remedies sought by Plaintiffs are unavailable. *Dorman,* supra, and *Zglinski* v. *Hackett,* 552 S.W.2d 933 (Tex.Civ.App. — Austin, 1977 writ ref. n.r.e.).

V.

SUBSTANTIAL INJURY

To be entitled to the relief sought, Plaintiffs must prove they are taxpayers who will sustain substantial injury if the relief is not granted. *Childs v. Reunion Bank,* supra. However, the only alleged shareholder (and thus the only alleged taxpayer) who is a party Plaintiff at this time is Herbert L. Brown. There is no summary judgment proof that Herbert L. Brown is in fact a shareholder in the Wynnewood Bank & Trust, or, if Herbert L. Brown is in fact a shareholder, there is no summary judgment evidence or proof of the number of shares held by Mr. Brown or the injuries suffered by Mr. Brown.

In fact, the only summary judgment proof with regard to the number or existence of shares of stock of Wynnewood Bank & Trust held by Herbert L. Brown is Plaintiffs' Exhibit #13 attached to the **[Tr. 51]** deposition of Emmett Frier. Such Exhibit is a list of shareholders in the Wynnewood Bank & Trust as of December 31, 1978 and which was mailed to Emmett Frier by someone at Wynnewood Bank & Trust. (Emmett Frier's Deposition p. 63). Such Exhibit does not contain in it the name Herbert L. Brown, or show any shares of stock owned by such individual. For this reason, Herbert L. Brown has not and cannot show substantial injury to himself by reason of the actions of Defendants in taxing shares of stock of Wynnewood Bank

& Trust, and in fact, has no standing to be a party Plaintiff. "Where proof of excessiveness or of substantial injury is required as a prerequisite to the granting of relief, that proof must be made as to each taxpayer who seeks relief." *City of Arlington, Texas v. Cannon,* 271 S.W.2d 414, 418 (1954).

Additionally, since the tax authorized by Art. 7166 V.A.T.S. is a tax upon the shareholders rather than upon the bank itself, it cannot be maintained by the bank that it will suffer any substantial injury if Defendants impose the tax authorized by Art. 7166 upon the shareholders of the bank.

The Court should grant summary judgment to Defendants because the record before the Court affirmatively shows that no substantial injury would be suffered by either Plaintiff.

VI.

In the event the Court finds that summary judgment should not be granted on the entire case, Defendants move the Court to grant partial summary judgment as to the contentions of Plaintiffs' that Defendants violated (a) State law, and/or (b) Federal law.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Motion be set for hearing, and that upon hearing summary judgment on the whole case be granted to Defendants. Alternatively, Defendants pray that partial summary judgment be granted in accordance with paragraph VI above. Defendants further pray for costs of Court and **[Tr. 52]** for such other and further relief to which they may show themselves entitled upon hearing.

(Signatures and affidavits omitted in printing)

[Tr. 54]

No. 79-9339-A

In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et al.
vs.
John Childs, et al.

AFFIDAVIT

The State of Texas }
County of Dallas }

Before me, the undersigned, a Notary Public in and for Dallas County, Texas personally appeared John Childs, known to me to be a credible person, over the age of eighteen (18) years, and fully competent to make this affidavit, and who being by me first duly sworn, upon his oath deposes and says:

"That I, John Childs, am making this affidavit based upon personal knowledge which I have and that such information contained herein is based upon my personal knowledge of the facts as hereinafter set out:

"I am the Tax Assessor-Collector for Dallas County, Texas and was so in the year 1979.

"The Court Order attached to this affidavit and made a part hereof is the policy of the Commissioners Court and of Dallas County with regard to property taxation, and it was also the policy followed by Dallas County and the Commissioners Court for the year 1979.

(Attachment to document beginning on App. 230, above)

"I know of no taxable property in the same classification as bank stock which was taxed at any lesser rate than that of bank stock in the year 1979."

JOHN CHILDS

John Childs

SUBSCRIBED AND SWORN to before me, on this 9th day of July, 1980, by the said JOHN CHILDS to which witness my hand and seal of office.

ANITA L. LUCK

Notary Public,
Dallas County, Texas

[Tr. 55]

COURT ORDER

ORDER No. 80 939

DATE: June 16, 1980

STATE OF TEXAS }
COUNTY OF DALLAS }

BE IT REMEMBERED at a regular meeting of Commissioners Court of Dallas County, Texas, held on the 16th day of June, 1980, on motion made by Jim Jackson, Commissioner of District #1, and seconded by Garry Weber, County Judge, the following order was adopted:

WHEREAS, the Commissioners Court of Dallas County, Texas, desires to make the taxation program of Dallas County clear to members of the public; and,

WHEREAS, it is the policy of Dallas County and the Commissioners Court of Dallas County that all property, real, personal and mixed, which has not been duly exempted from taxation and which is subject to taxation in Dallas County under the Constitution and laws of the United States and of this State: (1) shall be taxed; (2) shall be valued and assessed for taxation purposes in an equal and uniform manner, taking into consideration market value factors; and (3) no property shall be valued in excess of its market value.

IT IS HEREBY ADJUDGED, DECREED AND ORDERED by the Dallas County Commissioners Court that it is and shall be the policy of Dallas County and the Commissioners Court of Dallas County, that all property, real, personal and mixed, which has not been duly exempted from taxation and which is subject to taxation in Dallas County under

(Attachment to document beginning on App. 230, above)

the Constitution and laws of the United States and of this State: (1) shall be taxed; (2) shall be valued and assessed for taxation purposes in an equal and uniform manner, taking into consideration market value factors; and (3) no property shall be valued in excess of its market value.

DONE IN OPEN COURT this the 16th day of June, 1980.

GARRY WEBER
County Judge

JIM JACKSON
Comm. Dist. #1

JIM TYSON
Comm. Dist. #3

NANCY E. JUDY
Comm. Dist. #2

ROY ORR
Comm. Dist. #4

[Tr. 57]

No. 79-9339-A
In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et al.
vs.
John Childs, et al.

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

To the Honorable Judge of Said Court:

Comes now Dallas County, et al., Defendants, and in response to Plaintiffs' Motion for Summary Judgment filed herein would show the Court as follows:

I.

The Court should deny the Plaintiffs' Motion for Summary Judgment herein because as a matter of law the tax plan in question was neither arbitrary, illegal or fundamentally erroneous. Alternatively, there exists a question of fact as to the existence of any violation of State or Federal law by Defendants such as would render the tax plan in question arbitrary, illegal and fundamentally erroneous. Further, Plaintiffs herein are not entitled to judgment as a matter of law because their Petition requesting mandamus and injunctive relief was not timely filed and is therefore moot.

II.

STATE LAW

Art. 7166 V.A.T.S. (quoted in full in Plaintiffs' Motion for Summary Judgment pg. 7) is the authority for the tax on bank stock which is disputed by Plaintiffs. Plaintiffs make no contention that such statute is unconstitutional or otherwise invalid. Rather, Plaintiffs contend that since no "moneyed capital" other than bank stock is taxed, the tax plan violates Art. 7166 by taxing such bank stock "at a greater rate than is assessed against other moneyed capital in the hands of individuals."

[Tr. 58] "Moneyed capital" is not defined by statute in Texas. However, several cases have held that "moneyed capital" is capital which is employed by individuals when the object of their business is the making of a profit by the use of such capital as money — i.e., the banking business. As was stated in *Mercantile Bank vs. New York*, 121 U.S. 138, 7 S.Ct. 826, 30 L.Ed. 895 (1887):

> "But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. . . . neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, which constitutes its invested capital may consist of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist of any dealing in money or commercial representatives of money.

"So far as the policy of the government in reference to the national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all." (at p. 155-156)

As was further stated in the *Mercantile Bank* case:

"The object of the law was to establish a system of national banking institutions in order to provide a uniform and secure currency for the people . . . it was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the states the authority to tax them within the limits of the rule prescribed in the law. . . . the main purpose, of Congress, of fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state in levying such tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations of a like character. The language of the act . . . is to be read in the light of this policy." (at p. 154-155).

In other words, the purpose of the prohibition of a greater rate of taxation on other "moneyed capital" is to prevent unfair competition with banks.

This prohibition against unfair taxation was extended to State banks in the statutes of Texas, and it was held that the **[Tr. 59]** State statute incorporated the law of the Federal statute. *Primm v. Fort,* 57 S.W. 972 (Tex.Civ.App. 1900 writ ref.).

It is this use of the term "moneyed capital" that must be kept in mind when determining whether or not Dallas

County taxes any "moneyed capital" in the hands of individuals at a rate greater than that of bank stock. The burden of proof of such fact is upon the Plaintiffs.

The only such proof in any manner produced by Plaintiffs in support of this Motion for Summary Judgment is the deposition of John Childs at pages 60-61 wherein Mr. Childs was asked if he assessed "moneyed capital" in the hands of individuals, to which he answered "No, sir." (P.60 L.21). However, at P.64, L.24, when asked his definition of the term "moneyed capital", Mr. Childs answered, "To me, moneyed capital would be what money you have in the bank or an individual has in the bank. It's his assets." Mr. Childs further agreed that "moneyed capital" would just be the cash of an individual.

It is apparent from his answers that Mr. Childs was using a different meaning for the term "moneyed capital" than was contemplated by Art. 7166 as interpreted by the cases cited above. Thus, his testimony constitutes no proof of any taxation by Dallas County of "moneyed capital" in the hands of individuals other than bank stock at any lesser rate than that of bank stock. Additionally, Mr. Childs, in his controverting affidavit attached hereto and made a part hereof, has specifically denied knowledge of any taxation by Dallas County of taxable property at a lesser rate than bank stock. Such affidavit further states that Dallas County has employed and does employ a tax policy (which is attached to the affidavit and made a part thereof) which cannot be characterized as arbitrary, illegal or fundamentally erroneous.

[Tr. 60] Therefore, Plaintiffs' contention that bank stock is taxed at a greater rate than other "moneyed capital" in the hands of individuals is not supported by any summary judgment proof and must be overruled. It likewise must be overruled because of the absence of proof of the existence

of any "moneyed capital" in the hands of individuals other than bank stock. Alternatively, the Motion for Summary Judgment must be overruled because a fact question exists with regard to these matters.

III.

FEDERAL LAW

Plaintiffs contend that the inclusion of United States obligations in the valuation of bank stock is a violation of 31 U.S.C. 742 (quoted in Plaintiffs' Motion for Summary Judgment at p. 11.). Such a contention flies in the face of over one hundred years of United States Supreme Court decisions. *Van Allen v. Assessors,* 3 Wall. 573, 18 L.Ed. 229 (1866); *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191 (1923); *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 75 S.Ct. 607, 99 L.Ed. 950 (1955). It has been consistently held that in valuing the shares of banks for the purposes of taxation it is not necessary to deduct the value of United States securities held by the bank whose shares are taxed. Mr. Justice Moody, in *Home Savings Bank v. Des Moines,* 205 U.S. 503, 27 S.Ct. 571, 51 L.Ed. 901, succinctly stated the rule:

> "Although the states may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of national securities held by the corporation whose shares are taxed."

This principle has been followed by the Texas Courts. *Brown v. First National Bank of Corsicana*, 175 S.W. 1122 (Tex.Civ.App. — Dallas 1915, writ. ref.).

The only authority in point cited by Plaintiffs is *Montana* **[Tr. 61]** *Banks Association v. Montana Dep't of Revenue*, 580 P.2d 909 (1978). The Montana Court believed that the 1959 amendment to 31 U.S.C. 742, which added the last sentence of the section, changed previous law and that pre-1959 interpretations of the law were therefore inapplicable.

However, the Legislative history of the 1959 addition makes it clear that no change was intended. Rather, only a clarification of existing law was intended.

> "D. *CLARIFYING* EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
>
> Present state law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. *It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable income is determined.* The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheri-

tance taxes." (emphasis added) 1959 U.S. Cong. & Admin. News p. 2773.

As was further stated at p. 2777, "The new sentence makes it clear that the exemption *now provided* . . . extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly, in the computation of the tax . . . ." (emphasis added). The quoted sections make it clear that Congress had no intention of changing the existing law. Plaintiffs have cited no decision other than the *Montana* decision so holding, and it is clear that the Montana Court is in error and should not be followed.

IV.

Injunctive relief does not lie where the taxpayer is not diligent in availing itself of the remedy. *Childs v. Reunion Bank,* 587 S.W.2d 466 (Tex.Civ.App. — Dallas 1979, writ. ref. n.r.e.).

[Tr. 62] It is undisputed (see Plaintiffs' Motion for Summary Judgment p. 3) that the tax roll was certified by the Board of Equalization on July 30, 1979, and that taxes were levied and the tax rate set on August 13, 1979. It is likewise undisputed that the Plaintiffs' cause of action was not filed until September 5, 1979.

The actions taken on July 30, 1979, and August 13, 1979, by Defendants put the tax plan of Dallas County into effect for the year 1979. *Dallas Joint Stock Land Bank of Dallas v. State,* 118 S.W.2d 941 (Tex.Civ.App. — El Paso 1941, n.w.h.); *Dorman v. Ferris Independent School District,* 581 S.W.2d 783 (Tex.Civ.App. — Waco 1979, writ ref. n.r.e.). The tax plan having already taken effect at the time of the filing of Plaintiffs' Original Petition, the

remedies sought by Plaintiffs are unavailable. *Dorman*, supra, and *Zglinski v. Hackett*, 552 S.W.2d 933 (Tex.Civ. App. — Austin, 1977 writ ref. n.r.e.).

V.

SUBSTANTIAL INJURY

Plaintiffs' Motion for Summary Judgment alleges substantial damages amounting to Twenty-Four Thousand Four Hundred One Dollars and Fifty-Seven Cents ($24,401.57) on 377,766.25 shares of stock or 6.4 cents per share. However, the only alleged shareholder (and thus the only alleged taxpayer) who is a party Plaintiff at this time is Herbert L. Brown. There is no summary judgment proof that Herbert L. Brown is in fact a shareholder in the Wynnewood Bank & Trust, or, if Herbert L. Brown is in fact a shareholder, there is no summary judgment evidence or proof of the number of shares held by Mr. Brown or the injuries suffered by Mr. Brown.

In fact, the only summary judgment proof with regard to the number or existence of shares of stock of Wynnewood Bank & Trust held by Herbert L. Brown is Plaintiffs' Exhibit #13 attached to the deposition of Emmett Frier. Such exhibit is a list of shareholders in the Wynnewood Bank & Trust as of December 31, 1978 and which was mailed to Emmett Frier by someone at Wynnewood Bank & Trust. (Emmett Frier's Deposition p.63). Such Exhibit does not **[Tr. 63]** contain in it the name Herbert L. Brown, or show any shares of stock owned by such individual. For this reason, Herbert L. Brown has not and cannot show substantial injury to himself by reason of the actions of Defendants in taxing shares of stock of Wynnewood Bank & Trust, and in fact, has no standing to be a party Plaintiff. "Where proof of excessiveness or of substantial injury is

required as a prerequisite to the granting of relief, that proof must be made as to each taxpayer who seeks relief." *City of Arlington, Texas v. Cannon,* 271 S.W.2d 414, 418 (1954).

Additionally, since the tax authorized by Art. 7166 V.A.T.S. is a tax upon the shareholders rather than upon the bank itself, it cannot be maintained by the bank that it will suffer any substantial injury if Defendants impose the tax authorized by Art. 7166 upon the shareholders of the bank.

The only possible injury that could be suffered by the bank itself as a result of the imposition of the tax in question would be a lien on shares of the bank if the owner thereof refuses to pay the tax. There is no summary judgment proof that any shareholder would so refuse. There is also no showing or proof that such lien would constitute a substantial injury on the bank.

It is obvious that Plaintiffs have produced no summary judgment proof that either of them would suffer any substantial injury, or any injury at all, if the tax in question was imposed. For this reason, the Motion for Summary Judgment filed by Plaintiffs should be denied.

For all the foregoing reasons, Defendants pray the Court to overrule Plaintiffs' Motion for Summary Judgment. Defendants further pray for costs of Court and for general relief.

(Signatures omitted in printing)

[Tr. 65]

No. 79-9339-A

In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et al.
vs.
John Childs, et al.

Affidavit

The State of Texas }
County of Dallas }

Before Me, the undersigned, a Notary Public in and for Dallas County, Texas personally appeared John Childs, known to me to be a credible person, over the age of eighteen (18) years, and fully competent to make this affidavit, and who being by me first duly sworn, upon his oath deposes and says:

"That I, John Childs, am making this affidavit based upon personal knowledge which I have and that such information contained herein is based upon my personal knowledge of the facts as hereinafter set out:

"I am the Tax Assessor-Collector for Dallas County, Texas and was so in the year 1979.

"The Court Order attached to this affidavit and made a part hereof is the policy of the Commissioners Court and of Dallas County with regard to property taxation, and it was also the policy followed by Dallas County and the Commissioners Court for the year 1979.

(Attachment to document beginning on App. 243, above)

"I know of no taxable property in the same classification as bank stock which was taxed at any lesser rate than that of bank stock in the year 1979."

JOHN CHILDS

John Childs

SUBSCRIBED AND SWORN to before me, on this the 9th day of July, 1980, by the said JOHN CHILDS to which witness my hand and seal of office.

ANITA L. LUCK

Notary Public, Dallas County, Texas

[Tr. 65] COURT ORDER

ORDER No. 80 939
DATE: Jun 16 1980

STATE OF TEXAS }
COUNTY OF DALLAS }

BE IT REMEMBERED at a regular meeting of Commissioners Court of Dallas County, Texas, held on the 16th day of June, 1980, on motion made by Jim Jackson, Commissioner of District No. 1, and seconded by Garry Weber, County Judge, the following order was adopted:

WHEREAS, the Commissioners Court of Dallas County, Texas, desires to make the taxation program of Dallas County clear to members of the public; and,

WHEREAS, it is the policy of Dallas County and the Commissioners Court of Dallas County that all property, real,

personal and mixed, which has not been duly exempted from taxation and which is subject to taxation in Dallas County under the Constitution and laws of the United States and of this State: (1) shall be taxed; (2) shall be valued and assessed for taxation purposes in an equal and uniform manner, taking into consideration market value factors; and (3) no property shall be valued in excess of its market value.

IT IS HEREBY ADJUDGED, DECREED AND ORDERED by the Dallas County Commissioners Court that it is and shall be the policy of Dallas County and the Commissioners Court of Dallas County, that all property, real, personal and mixed, which has not been duly exempted from taxation and which is subject to taxation in Dallas County under the Constitution and laws of the United States and of this State: (1) shall be taxed; (2) shall be valued and assessed for taxation purposes in an equal and uniform manner, taking into consideration market value factors; and (3) no property shall be valued in excess of its market value.

DONE IN OPEN COURT this the 16th day of June, 1980.

GARRY WEBER
County Judge

JIM JACKSON	JIM TYSON
Comm. Dist. No. 1	Comm. Dist. No. 3
NANCY E. JUDY	ROY ORR
Comm. Dist. No. 2	Comm. Dist. No. 4

[Tr. 85]

No. 79-9339-A

In The District Court
14th Judicial District
Dallas County, Texas

Wynnewood Bank & Trust, et al
vs.
John Childs, Individually and as Tax Assessor-Collector of Dallas County, Texas; Dallas County, Texas; Garry A. Weber, County Judge; Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, Individually and as the Dallas County Commissioners Court and as the Dallas County Board of Equalization

PLAINTIFFS' FIRST AMENDED PETITION

To The Honorable Judge of said Court:

Now come Wynnewood Bank & Trust, a Texas banking corporation, and all its Shareholders of Record as of January 1, 1979, as listed on Exhibit "A" attached hereto (hereinafter called Plaintiffs), and complain of John Childs, Individually and as Tax Assessor-Collector of the County of Dallas, and of the County of Dallas, Texas, its County Judge, Garry A. Weber, and its Commissioners, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr, individually and in their capacity as members of the Dallas County Commissioners Court and as members of the County Board of Equalization, and would respectfully show the Court the following:

I.

That Defendant JOHN CHILDS is the Tax Assessor-Collector for the County of Dallas, and has his place of business at the Dallas County Government Center, Dallas, Dallas County, Texas, where he may be served with citation.

That Defendants, the COUNTY OF DALLAS, TEXAS, its County Judge, GARRY A. WEBER, and its Commissioners, JIM JACKSON, NANCY JUDY, JIM TYSON, and ROY ORR, have their place [Tr. 86] of business at the Dallas County Government Center, Dallas, Dallas County, Texas, where they may be served with citation.

That Plaintiff, WYNNEWOOD BANK & TRUST, is a Texas banking institution, having its office and principal place of business at 501 Wynnewood Village, Dallas, Texas. The Shareholders are owners of capital stock in Wynnewood Bank & Trust in Dallas County, Texas. These Plaintiffs seek common relief herein based upon identical questions of law and fact.

II.

Plaintiffs have reason to believe and do believe that Defendants intend to assess and collect a tax on the shares of Wynnewood Bank & Trust from the Shareholders of said bank, and that Defendants will do so unless this Court enjoins Defendants from so doing. These acts on the part of Defendants constitute a plan of taxation in violation of Article 7166 and Article 7150.6 of Texas Revised Civil Statutes because Defendants threaten to assess and impose a tax on Wynnewood Bank & Trust shares differently and at a greater rate than is assessed against other monied capital in the hands of individuals which is located within the County of Dallas. A tax scheme that levies against only one type of monied capital, bank stock, while not levying

against any other monied capital in the hands of individuals is in obvious violation of Article 7166, Texas Revised Civil Statutes Annotated. Article 7150.6 only provides for taxation of intangible personal property such as bank stock only if taxable under Article 7166. Plaintiffs allege Article 7166 authorizes no tax on these Plaintiffs. Effective administrative relief is not now available and all administration remedies have been exhausted.

Article 7150.6 of Texas Revised Civil Statutes Annotated reads as follows:

"Art. 7150.6. Exemption of intangible property

(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.

(b) Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166, or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes); by Article 4.01, Insurance Code, as amended; by Chapter 194, Acts of the 60th Legislature, Regular Session, 1967 (Article 7244a, Vernon's Texas Civil [Tr. 87] Statutes); or by Chapter 358, Acts of the 54th Legislature, 1955 (Article 7105a, Vernon's Texas Civil Statutes).

(c) For purposes of this article, 'intangible property' means a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate

of deposit, share account, share certificate account, share deposit account, insurance policy, disability or retirement benefit, cause of action, contract, and goodwill."

Article 7166 of Texas Revised Civil Statutes Annotated reads as follows:

"Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed

against other moneyed capital in the hands of individuals."

It has been the long established practice and custom of the Plaintiffs and Defendants that taxes purported to be legally imposed by Defendants on shareholders of Plaintiff are billed to the Bank by Defendants and paid by the Bank on behalf of its respective shareholders to prevent Defendants' imposition of the lien provisions in Article 7166. Because of the recent amendments to the Texas Constitution (Article VIII, Section 1) and statutes arising thereto which in essence exempted all personal property in the hands of individuals from taxation, under Article [Tr. 88] 7166, taxation of bank stocks owned by individuals is now contrary to the validity determining statutes and is fundamentally erroneous and illegal.

III.

As further grounds, Plaintiffs would show that any attempt by the Tax Assessor-Collector to compute the fair market value of the various bank shareholders' stock without subtracting the value of United States Government obligations held by Wynnewood Bank & Trust from the sum total of the capital of the bank is in direct contravention and in violation of Title 31 U.S.C. Sec. 742 which provides an exemption from taxation:

"All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof

imposed on corporations and except estate taxes or inheritance taxes. (R.S. Sec. 1301; Sept. 22, 1959, P.L. 86-346, Title I, Sec. 105(a), 73 Stat. 622.)" (Emphasis added)

Plaintiffs have reason to believe and do believe that Defendants intend to assess and collect a tax on the shares of Wynnewood Bank & Trust without deducting the value of United States Government obligations held by Wynnewood Bank & Trust in computing the fair market value of the stock in the hands of shareholders. Such action by the Tax Assessor-Collector is in direct contravention of the laws of the United States.

IV.

Defendants' actions as set forth in paragraphs II and III and Defendants' scheme and plan of taxation which they again are threatening to put into effect for the present tax year are fundamentally illegal, and each and all of such actions are illegal.

V.

Defendants' actions as set forth in paragraphs II and III which they threaten to implement for the present tax year, are:

1. Arbitrary for the reason that they follow no valid determining principle;

2. Discriminatory against these Plaintiffs and other bank shareholders; and

3. Result, and threaten to result, in immediate, irreparable and substantial injury to these [Tr. 89] Plaintiffs and other bank shareholders in the form of grossly excessive taxes to be levied upon them,

and sought thereafter to be collected with interest and penalty if not timely paid in the amounts so set by said Defendant Tax Collector.

VI.

Plaintiffs would show that the foregoing verified allegations entitle them to this Honorable Court's issuance of Writ of Mandamus, ordering the Defendant Tax Assessor-Collector of the County of Dallas, Texas:

1. To adopt a policy and plan of taxation assessing all monied capital including bank stock in the hands of individuals within the County upon a uniform and equal basis.

2. To subtract the value of United States Government obligations held by Wynnewood Bank & Trust from the capital of the bank in determining the fair market value of the shares of the bank held by its shareholders.

VII.

Pleading in the alternative, Plaintiffs would show, absent this Honorable Court's issuance of the prayer for the Writ of Mandamus, that they are entitled to relief ordered by this Court's including the issuance of a Temporary Injunction against Defendants and entitled to a Permanent Injunction against Defendants (1) enjoining them from assessing, levying or collecting ad valorem taxes based upon their arbitrary and illegal scheme and plan of taxation, pending trial of this cause, and (2) alternatively, enjoining them from levying, assessing or collecting ad valorem taxes on the bank shares of these Plaintiffs and any other bank shareholders, based upon the arbitrary and illegal scheme and plan of taxation, pending trial of this cause.

Plaintiffs will suffer immediate and irreparable injury, loss and damage unless this illegal plan of taxation is enjoined. Plaintiffs have no adequate remedy at law. Such damages are continuing and to a large degree, intangible. If Plaintiffs wait until the taxes become delinquent and fall into default, a lien is created for such taxes and by statute there is restriction upon the payment of dividends or transfer of the stock. Further, Plaintiffs would be subject to penalty and interest which far exceed the taxes assessed for which Plaintiffs could never be compensated.

[Tr. 90] Plaintiffs would show the Court that should Defendants not be restrained and/or enjoined from implementing their tax plan by certifying the tax rolls, that the burden of these Plaintiffs to show substantial injury by law is greatly increased and not only will Plaintiffs be required to show substantial injury upon the trial of this action, but will further be required to prove that injury in dollars and cents.

Plaintiffs are willing, able and hereby offer to execute and file such bond, in accordance with Rule 684, Texas Rules of Civil Procedure, as may be set by this Honorable Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court:

A.(1) issue its Writ of Mandamus, requiring Defendants to perform their duties as hereinabove more specifically set out in Paragraph VI, and alternatively, Plaintiffs pray that:

(2) a Temporary Injunction issue enjoining Defendants, their agents, servants and employees from directly or indirectly enforcing or attempting

to enforce the aforesaid assessments and the collection of taxes on said assessments;

(i) approving the taxing plan for the county tax year of 1979, either generally or as it applies to Plaintiffs;

(ii) issuing tax notices or statements to Plaintiffs;

(iii) attempting to collect taxes either generally or from Plaintiffs or any member of the class based upon the illegal scheme and plan of taxation employed or threatened to be employed by the Defendants;

(iv) using their present illegal taxing plan to establish property values county wide and as a basis to levy taxes against Plaintiffs' property;

(v) doing any act which is intended, designed or calculated to persuade, order or induce Plaintiffs to accept improper valuations, all as set forth above;

[Tr. 91]

B. Upon final hearing on the merits, the temporary injunction be made permanent;

C. Judgment be entered against Defendants for all costs of suit; and

D. Plaintiffs have such other and further relief, general and special, at law or in equity, to which Plaintiffs may be justly entitled.

(Signatures, Affidavit, and Exhibits omitted in printing)

[Tr. 108]

No. 79-9339-A

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
14TH JUDICIAL DISTRICT

WYNNEWOOD BANK & TRUST, ET AL.
VS.
JOHN CHILDS, ET AL.

DEFENDANTS' FIRST SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendants and file this, their First Supplemental Motion for Summary Judgment in supplement to their previously filed Motion for Summary Judgment and would show the Court as follows:

I.

Defendants' Motion for Summary Judgment should be granted because Plaintiffs have adequate remedies at law. Art. 7345f V.A.T.S. provides for appeal to district court from adverse decisions of the Board of Equalization. Plaintiffs could have appeared before the Board of Equalization and requested a zero valuation for their stock and appealed therefrom if the decision was adverse.

Additionally, as set out in the case of *City of Waco vs. Conlee Seed Company*, 449 S.W.2d 29 (Tex. 1969), the questions raised herein could be raised for the first time as a defense at the time suit for collection is filed.

Therefore, the extraordinary remedies requested by Plaintiffs should be denied.

II.

Defendants' Motion for Summary Judgment should be granted as to Plaintiffs' request for mandamus because as a matter of law, Plaintiffs do not have standing to bring mandamus to require a public official to do his job. *Julian v. Carrollton Independent School District,* 346 S.W.2d 189 (Tex.Civ.App. — Texarkana 1961, n.w.h.).

[Tr. 109] WHEREFORE, PREMISES CONSIDERED, Defendants pray their Motion for Summary Judgment be granted in whole or, alternatively, in part, for general relief, and for costs of Court.

(Signature omitted in printing)

[Tr. 110]

NO. 79-9339-A

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
14TH JUDICIAL DISTRICT

WYNNEWOOD BANK & TRUST, ET AL.

VS.

JOHN CHILDS, ET AL.

SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Defendants and supplement their previously filed Response to Motion for Summary Judgment, and would show the Court as follows:

I.

Plaintiffs' Motion for Summary Judgment should be denied because there is no proof in the Summary Judgment record that any of the shareholders now made Plaintiffs in Plaintiffs' First Amended Petition have suffered substantial damages. Such proof must be made as to each taxpayer seeking relief before injunctive relief can be granted. *City of Arlington v. Cannon,* 271 S.W.2d 414, (1954); *Neville v. Cass County,* 523 S.W.2d 419 (Tex.Civ. App. — Texarkana, 1975 writ ref'd. n.r.e.); and *Johnson City Independent School District v. Crider,* 535 S.W.2d 725 (Tex.Civ.App. — Austin 1976 writ ref'd. n.r.e.) are

cases which have supported this proposition. As was stated in the *Crider* case at p.728

> ". . . where a taxpayer seeks to enjoin the collection of a tax because of some illegal feature of the tax plan or the manner in which the plan is applied, he must show how the alleged illegality damages *him*. He must not only show precisely how he has been damaged, but that the damage to him is substantial." (underlined portion in italics)

> ". . . the actual working of the allegedly wrong system may have actually resulted in equality and uniformity of taxation. There must be more than the mere adoption of a fundamentally wrong principle or method, of taxation. The courts grant relief upon 'the adoption of a fundamentally wrong principle or method, *the application of which substantially injures the complainant.*'" (underlined portion in italics).

Each taxpayer is in a unique position with respect to ad valorem taxes according to the kind and amount of taxable property **[Tr. 111]** such taxpayer may own. Therefore, the damages (if any) suffered by such taxpayer is unique to such taxpayer and cannot be inferred from damages to another. The mere fact that under a particular tax plan a tax may be imposed on a certain kind of property does not necessarily tend to show damage to the taxpayer paying such tax. Rather, it is the taxpayer's overall tax bill that is important.

In the absence of a tax on bankshares, it is only common sense to expect that other forms of taxable property will be required to take up the burden which is shed by the bankshares. Thus, a taxpayer with other forms of taxable property may in actuality have his overall tax bill raised

by the absence of a tax on bankshares. It is up to the individual taxpayer to show actual and substantial damages by reason of the tax imposed. In *Thompson v. City of Houston,* 410 S.W.2d 813 (Tex.Civ.App. — Houston 1967 writ ref'd. n.r.e.), a taxpayer who sought to enjoin the collection of taxes because of the failure of the tax roll to include personal property was denied an injunction. It was held that before he would be entitled to injunctive relief, it was necessary for the taxpayer to show actual and substantial injury by reason of the omission of a tax on personal property; and to do so he would have to show that his total tax bill would be substantially reduced by the inclusion of personal property on the tax rolls.

There is no proof in the summary judgment record before the Court that either individually or collectively the tax burden upon the Plaintiff-shareholders would be substantially reduced by abolition of the ad valorem tax on bankstock.

II.

The Plaintiff Wynnewood Bank & Trust contends that it is substantially damaged by the tax in question because of the provisions of Art. 7166 which forbid the transference of stock or the payment of dividends thereon by the bank if the tax imposed by **[Tr. 112]** Art. 7166 is not paid, and further by the creation of a lien on such stock. By the terms of the statute, such restrictions apply only to those shares of stock upon which delinquent taxes are owed, and there are no restrictions in Art. 7166 as to any stock on which the tax is fully paid. Summary Judgment proof on such point in favor of the Plaintiffs is deficient in the following respects:

1. There is no proof that any shareholder will or has refused to pay the tax when due.

2. Since the Plaintiff-bank has no liability to pay such taxes, there is no summary judgment proof as to how such restrictions damage the bank in any way, or that such damage is substantial.

As a matter of law, the remedies afforded by Art. 7166 do not substantially damage the Plaintiff Wynnewood Bank & Trust; and Plaintiff Wynnewood Bank is not a proper party to contest such tax. Alternatively, there is a fact issue as to whether or not the remedies provided by Art. 7166 constitute damage, or if so, whether such damage is substantial.

III.

Statements by Mr. John Childs and Mr. Emmett Frier in their depositions concerning the taxation or lack thereof of moneyed capital in the hands of individuals do not constitute adequate summary judgment proof that Dallas County taxes bankstock at a greater rate than other moneyed capital in the hands of individuals because:

1. Such statements are mere conclusions of law rather than assertions of fact;

2. Such evidence is not uncontroverted, nor is it ". . . clear, positive and direct, otherwise credible and free from contradictions and inconsistencies . . ." as required by Rule 166A of the T.R.C.P.

Additionally, there is no proof in the summary judgment record, **[Tr. 113]** or even any allegation that bank stock is taxed at a greater *rate* than other moneyed capital, if any there be. Rather, the allegations go to the non-existence of a tax on other moneyed capital. Article 7166 does not by its terms require a tax on other moneyed capital. Rather, if such tax is imposed, Article 7166 prohibits taxa-

tion of bank stock at a greater rate. Further, Article VIII, Section 1, of the Texas Constitution, has been amended so that it is not mandatory that all intangibles be taxed but such is permissible. Article 7150.6, which was in effect only for the year 1979, specifically provides for the taxing of bank stock as follows:

> "(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . .
>
> (c) For purposes of this article, 'intangible property' . . . includes a stock . . ."

Article 7166 states the manner of taxing bank stock and Article 7150.6 exempts other intangibles except for certain types as set out therein. Article 7166 and 7150.6 are not in conflict, and, if they are in conflict, Attorney General's Opinion MW-139 (1980) provides that where two statutes conflict, the one passed last by the legislature is controlling. The opinion states that:

> "The Code Construction Act, however, states the following general rule: '. . . if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.'"

Therefore, as stated above, Article 7150.6, being the last statute passed, is controlling, and other intangibles are thereby exempt from taxation.

IV.

Plaintiffs' Motion for Summary Judgment should be denied because Plaintiffs have adequate remedies at law. Art. 7345f V.A.T.S. provides for appeal to district court from adverse decisions of the Board of Equalization. Plaintiffs could have **[Tr. 114]** appeared before the Board of Equalization and requested a zero valuation for their stock and appealed therefrom if the decision was adverse.

Additionally, as set out in the case of *City of Waco v. Conlee Seed Company,* 449 S.W.2d 29 (Tex. 1969), the questions raised herein could be raised for the first time as a defense at the time suit for collection is filed.

Therefore, the extraordinary remedies requested by Plaintiffs should be denied.

V.

Plaintiffs' Motion for Summary Judgment should be denied because as a matter of law Plaintiffs do not have standing to bring mandamus to require a public official to do his job. *Julian v. Carrollton Independent School District,* 346 S.W.2d 189 (Tex.Civ.App. — Texarkana 1961, n.w.h.).

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs' Motion for Summary Judgment be denied, for costs of Court and general relief.

(Signature omitted in printing)

[Tr. 116]

No. 79-9339-A

In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et al.

vs.

John Childs, et al.

PLEA IN ABATEMENT AND MOTION TO DISMISS OF DEFENDANTS AND FIRST AMENDED ORIGINAL ANSWER SUBJECT THERETO

To the Honorable Judge of said Court:

Come now Defendants in the above styled and numbered cause, and file this, their Plea in Abatement and Motion to Dismiss, and their First Amended Original Answer Subject Thereto, and for such would show the Court as follows:

I.

There is no justiciable controversy between Plaintiff Wynnewood Bank & Trust and Defendants. Plaintiff Wynnewood Bank & Trust is not a proper party because such Plaintiff seeks to complain about a tax which is not imposed or threatened to be imposed upon it. Rather, Plaintiffs have alleged that such tax will be imposed upon owners of shares in Wynnewood Bank & Trust. Since Plaintiff Wynnewood Bank & Trust has no justiciable interest in a tax which is not imposed upon it, this cause of action should be abated and dismissed as to such Plaintiff.

II.

This action should be abated and dismissed because it is moot and not timely filed. The tax plan attacked by Plain-

tiffs was put into effect on August 13, 1979, and this cause of action was not filed until September 5, 1979. The relief sought by Plaintiffs is not available unless such cause of action is filed before the tax plan is put into effect. Plaintiffs having failed to do so, the cause of action should be abated and dismissed.

III.

[Tr. 117] This cause of action should be abated and dismissed because Plaintiffs have an adequate remedy at law. All taxpayers have the right to appear before the Board of Equalization to contest the value of their property. The Plaintiffs herein could have appeared and requested a zero valuation for such property. If Plaintiffs disagreed with the valuation on their property as set by the Board of Equalization, Article 7345f V.A.T.S. provides for right of appeal to a district court. For this reason, Plaintiffs' cause of action should be dismissed.

IV.

This cause of action should be abated and dismissed as to the request for mandamus because Plaintiffs do not have standing to bring mandamus against a public official to cause such official to do his job.

V.

Plaintiffs' suit should be abated and dismissed since the Court has no jurisdiction of the alleged claims and there is no justiciable controversy between the parties at this time.

WHEREFORE, PREMISES CONSIDERED, Defendants pray the Plea in Abatement and Motion to Dismiss be in all things granted and that Plaintiffs take nothing by their suit.

(Signature and affidavit omitted in printing)

[Tr. 119]

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER, SUBJECT TO THEIR PLEA IN ABATEMENT AND MOTION TO DISMISS

To the Honorable Judge of Said Court:

Come now Defendants in the above styled and numbered cause and, subject to all Pleas in Abatement and Motion to Dismiss, and all other dilatory pleadings filed herein by Defendants, and without waiving same, file this, their First Amended Original Answer to Plaintiffs' Original Petition, and for such would show the Court the following:

I.

Defendants deny each and every, all and singular, the allegations contained in Plaintiffs' Original Petition, demand strict proof thereof, and of this they put themselves upon the Country.

II.

Defendants would show the Court that they have complied with Articles 7150.6 and 7166 of V.A.T.S. with regard to the taxation of the property in question. These articles authorize such tax. Article VIII, Section 1, of the Texas Constitution, has been amended so that it is not mandatory that all intangibles be taxed but such is permissible. Article 7150.6, which was in effect only for the year 1979, specifically provides for the taxing of bank stock as follows:

> "(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . .

> (c) For purposes of this article, 'intangible property' . . . includes a stock . . ."

Article 7166 states the manner of taxing bank stock and Article 7150.6 exempts other intangibles except for certain types as set out therein. Article 7166 and 7150.6 are not in conflict, and, if they are in conflict, Attorney General's Opinion MW-139 (1980) provides that where two statutes conflict, the one passed last by the legislature is controlling. The opinion states that:

> **[Tr. 120]** "The Code Construction Act, however, states the following general rule: '. . . . if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.' "

Therefore, as stated above, Article 7150.6, being the last statute passed, is controlling, and other intangibles are thereby exempt from taxation.

III.

This tax is against the owner of the stock and not the Bank, and the U. S. Government obligations are owned by the Bank. Defendants would also show that Title 31 U.S.C. § 742 does not require the deletion or deduction of United States Government obligations held by the bank Plaintiffs prior to determining the value of the capital stock in question which is owned by another and not the Bank. Such act, as amended, is a mere codification of existing judicial decisions which have specifically approved the method followed by these Defendants in ascertaining market value of bank stock. The fact that the Bank may have a custom of paying the tax is not material and does not change the legal responsibility of the stockholder to pay the tax.

IV.

For further answer, Defendants would show the Court that Dallas County had only one tax rate for 1979 for all taxable property, including bank stock. Therefore, no bank stock was taxed or threatened to be taxed at any greater rate in 1979 in Dallas County than any other property.

V.

Defendants hereby adopt by reference and incorporate herein as affirmative defenses, if such be necessary, all matters and defenses heretofore pleaded by Defendants, including specifically all Pleas in Abatement and other dilatory pleas.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs take nothing by their suit, and for such other and **[Tr. 121]** further relief, general and special, at law and in equity, to which the Defendants may be entitled, and that Defendants go hence with their costs without day.

(Signature omitted in printing)

[Tr. 134]

No. 79-9339-A

In The District Court of
Dallas County, Texas
14th Judicial District

Wynnewood Bank & Trust, et. al.
vs.
John Childs, et. al.

DEFENDANTS' SECOND AMENDED ORIGINAL ANSWER SUBJECT TO THEIR PLEA IN ABATEMENT AND MOTION TO DISMISS

To the Honorable Judge of said Court:

Come now Defendants in the above styled and numbered cause and, subject to all Pleas in Abatement and Motion to Dismiss, and all other dilatory pleadings filed herein by Defendants, and without waiving same, file this, their Second Amended Original Answer to Plaintiffs' Original Petition, and for such would show the Court the following:

I.

Defendants deny each and every, all and singular, the allegations contained in Plaintiffs' Amended Petition, demand strict proof thereof, and of this they put themselves upon the Country.

II.

Defendants would show the Court that they have complied with Articles 7150.6 and 7166 of V.A.T.S. with regard to the taxation of the property in question. These articles authorize such tax. Article VIII, Section 1, of the Texas Constitution, has been amended so that it is not mandatory that all intangibles be taxed but such is permissible. Article

7150.6, which was in effect only for the year 1979, specifically provides for the taxing of bank stock as follows:

> "(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.
>
> (b) Intangible property is taxable ad valorem if its taxation is provided for by Article . . . 7166 . . .
>
> (c) For purposes of this article, 'intangible property' . . . includes a stock . . ."

Article 7166 states the manner of taxing bank stock and Article 7150.6 exempts other intangibles except for certain types as set out therein. Article 7166 and 7150.6 are not in conflict, and, if they are in conflict, Attorney General's Opinion MW-139 (1980) provides that where two statutes conflict, the one passed last by the legislature is controlling. The opinion states that:

> **[Tr. 135]** "The Code Construction Act, however, states the following general rule: '. . . . if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.'"

Therefore, as stated above, Article 7150.6, being the last statute passed, is controlling, and other intangibles are thereby exempt from taxation.

III.

This tax is against the owner of the stock and not the Bank, and the U. S. Government obligations are owned by the Bank. Defendants would also show that Title 31 U.S.C. § 742 does not require the deletion or deduction of United States Government obligations held by the bank

Plaintiffs prior to determining the value of the capital stock in question which is owned by another and not the Bank. Such act, as amended, is a mere codification of existing judicial decisions which have specifically approved the method followed by these Defendants in ascertaining market value of bank stock. The fact that the Bank may have a custom of paying the tax is not material and does not change the legal responsibility of the stockholder to pay the tax.

IV.

For further answer, Defendants would show the Court that Dallas County had only one tax rate for 1979 for all taxable property, including bank stock. Therefore, no bank stock was taxed or threatened to be taxed at any greater rate in 1979 in Dallas County than any other property.

V.

Defendants hereby adopt by reference and incorporate herein as affirmative defenses, if such be necessary, all matters and defenses heretofore pleaded by Defendants, including specifically all Pleas in Abatement and other dilatory pleas.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs take nothing by their suit, and for such other and **[Tr. 136]** further relief, general and special, at law and in equity, to which the Defendants may be entitled, and that Defendants go hence with their costs without day.

(Signatures and affidavits omitted in printing)

[Tr. 137]

No. 79-9339-A

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
14TH JUDICIAL DISTRICT
WYNNEWOOD BANK & TRUST, ET AL.
VS.
JOHN CHILDS, ET AL.

SUMMARY JUDGMENT

On this the 8th day of August, 1980, came on to be heard in the above entitled and numbered cause the motions for summary judgment of plaintiffs and of defendants; the parties appeared by and through their respective attorneys of record and announced ready for trial; the Court proceeded to hear the pleadings, evidence and argument of counsel and, after hearing same, is of the opinion and finds that the plaintiffs' motion for summary judgment should be denied. The Court further finds that the defendants' motion for summary judgment should be in all things granted, and that the plaintiffs should take nothing from said defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs' motion for summary judgment shall be and the same is hereby in all things. denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendants' motion for summary judgment shall be and the same is hereby in all things granted, and the plaintiffs shall take nothing from the defendants and the defendants shall recover their costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court herein shall be and the same are hereby taxed against the plaintiffs, for all of which let execution issue.

SIGNED AND ENTERED this 8th day of August, A. D. 1980.

FRED D. HARLESS

Judge

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard and
Justices Akin and Robertson
Opinion by Chief Justice Guittard
January 23, 1981

OPINION
ON MOTION FOR REHEARING

For the reasons stated in our opinion of this date in No. 20660, Bank of Texas, et al v. John Childs, et al, 615 S.W.2d 810 (Tex. Civ. App.-Dallas 1981), our former opinion is withdrawn, appellees' motion for rehearing is granted, appellants' motion for rehearing is overruled, and the judgment of the district court is affirmed.

CLARENCE A. GUITTARD
Chief Justice

Justices Akin and Robertson concur.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,

v.

JOHN CHILDS, et al.

Friday, January 23, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, John Childs, et al, have and recover of and from the appellants, Wynnewood Bank & Trust, et al, and from Vic R. Moerbe and Robert S. Jones, their sureties on appeal bond, all costs in this behalf incurred or expended, for which execution may issue, and that this decision be certified below for observance.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20659

WYNNEWOOD BANK & TRUST, et al.,
Appellants,

v.

JOHN CHILDS, et al.,
Appellees.

Friday, May 1, 1981

ORDER OVERRULING APPELLANTS' MOTION FOR REHEARING

This day came on to be heard appellants' motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and ordered that the motion be and the same is hereby overruled.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-453, WYNNEWOOD BANK & TRUST ET AL, v. JOHN CHILDS ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

Opposition

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Supreme Court, U.S.
FILED
APR 16 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1717

IN THE

Supreme Court of the United States

October Term 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,

Petitioners,

vs.

DALLAS COUNTY, ET AL.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF OF RESPONDENTS DALLAS COUNTY, TEXAS, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

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Dallas County, et al.

QUESTIONS PRESENTED[1]

1. Whether 31 U.S.C. § 742 requires that United States obligations owned by a banking corporation be deducted from the cash value of an individual shareholder's shares in the banking corporation in order for a state ad valorem tax on the individual shareholder's stock to be valid.

2. Whether the Borrowing Clause of the Constitution of the United States (raised only in Petition for Writ of Certiorari) prohibits a state ad valorem tax on corporate stock owned by individual shareholders of a banking corporation unless United States obligations owned by the corporation are deducted from the value of the shareholder's stock.

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[1]Respondents, being dissatisfied with the Petitioners' presentation of the Questions Presented, have rephrased the questions so as to more clearly and accurately state same.

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NO. 81-1717

IN THE

Supreme Court of the United States

October Term 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,

Petitioners,

vs.

DALLAS COUNTY, ET AL.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF OF RESPONDENTS DALLAS COUNTY, TEXAS, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

OPINIONS BELOW

Petitioners seek review of the opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at

Dallas, in *Bank of Texas, et al. v. John Childs, et al.*,[2] reported at 615 S.W.2d 810. (Respondents' Appendix A).[3]

The opinion in *Wynnewood Bank and Trust, et al. v. Childs, et al.*, No. 20659, relying on the reasons stated in the Court's opinion in *Bank of Texas*, supra, was not reported but is included in Appendix B.

The opinion in *American Bank and Trust, et al., v. John Childs, et al.*, No. 20915, was not reported and is included in Appendix C.

JURISDICTION

The formal procedural requisites are alleged in the jurisdictional statement but an examination of the petition reveals that the Petitioners are not complaining that Tex.Civ.Stat. Ann. art. 7166 (Vernon 1960) is constitutionally invalid or that the statute as written is repugnant to a federal statute. Instead, they complain that the statute was erroneously implemented. The Petitioners have not shown jurisdiction in the United States Supreme Court, therefore, under 28 U.S.C. § 1257(3).

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[2]Although this is the only opinion Petitioners seek to review, Petitioners chose to file the Petition for Writ of Certiorari under the style of American Bank and Trust Company, et al. v. Dallas County, an unreported case which relied on the Court of Civil Appeals Opinion in this case.

[3]Dallas County was the only taxing entity involved in this case in the Texas Courts. All of the stockholders of Bank of Texas were parties to this suit in the Texas Trial and Appellate Courts as was Bank of Texas. This was not a class action. These parties have been joined with stockholders of Wynnewood Bank and the Wynnewood Bank (Cause No. 20659 in the Court of Civil Appeals), as well as 52 other banks and class representatives in American Bank and Trust, et al. v. John Childs, et al., (Cause No. 20615 in the Court of Civil Appeals) in the Petition for Writ of Certiorari filed herein. The only taxing entity involved in the Wynnewood Bank case was Dallas County.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incorrect in its assertions regarding the Texas statutory requirements for assessing and valuing a stockholder's stock in a banking corporation for tax purposes in Texas and the method of implementing the statute.

Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960) (included in Appendix D) provides that each share of a shareholder's stock in a banking corporation shall be "...taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed...." The formula used by the tax assessor to arrive at the cash value of the shares of stock was to use a figure equal to the total equity capital of the bank as the total value of all shares of stock. Equity capital is made up of stock, surplus and undivided profits (SF 1045)[4]. This figure is divided by the number of shares of stock in the bank to get a per-share value for the "actual cash value" of the ownership interest of each stockholder (SF 226-7)[5]. From this figure, the assessors subtracted a pro-rata amount for the assessed value of real estate owned by the bank, since real estate owned by the bank is separately taxed to the bank. It is inaccurate, therefore, to say that the assessment is on the bank's assets. It is equally inaccurate to say that the "...banks' shares were taxed..."[6] under said Art. 7166 since the bank did not own any of its own stock. The assessment is on each share of stock owned by stockholders of the banking corporation and the equity capital formula was used

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[4]Record of evidence in American Bank and Trust Company, et al., v. Dallas County, et al.

[5]Record of evidence in Bank of Texas, et al., v. Childs, et al.

[6]See Petition for Writ of Certiorari, p. 4, last paragraph.

to establish the actual cash value of each share. The tax assessor need not know the amount of Federal obligations or any other assets owned by the bank, or even if any at all are owned, when determining the actual cash value of the stock. (SF 124-5, American Bank and Trust Company, et al. v. Dallas County, et al.).

The Petitioners do not contend that the cash value computed by the equity capital formula was higher than the actual cash value of the shares. They simply contend that *if this formula is used*, the value of the United States obligations owned by the corporation should be subtracted from the value of the shares owned by the shareholders. Therefore, Petitioners have shown no injury resulting from the use of this formula to arrive at the actual cash value of the corporate stock. The Petitioners do not complain that the *statute* is contrary to any United States statutes or Constitution and, therefore, Petitioners have not shown jurisdiction to review under 28 U.S.C.§ 1257(3).

SUMMARY OF ARGUMENT

Although Petitioners claim that there is a conflict in decisions between Montana and Texas concerning the taxation of bank stock, that conflict is one of appearance rather than reality, since there was a significant factual difference between the two cases. If there is a question raised by any such alleged conflict, it is not substantial.

The right of local government to impose an ad valorem tax on bank stock owned by shareholders based on the actual cash value of the shares without making a deduction for United States obligations owned by the bank has been affirmed by this Court on several occasions and cannot now be regarded as unsettled. 12 U.S.C. § 548 as amended per-

mits taxing bank shares. 31 U.S.C. § 742 prohibits taxing United States securities owned by the bank but has no affect on taxation of a separate property interest owned by the shareholder.

Petitioners herein claim violations of United States Constitution Article I, § 8, cl.2 (the Borrowing Clause). Since Petitioners have not raised any issues under such provision in any lower Court, they cannot now raise it in this Court. In any event, the tax in question does not infringe on the power of the United States to borrow money, since it does not discriminate in law or in fact against United States obligations. As to United States obligations, this tax is "blind", since the amount of United States obligations owned by the bank need not be known to the tax assessor for the amount of taxes to be fixed.

ARGUMENT AND REASONS WHY WRIT SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT BETWEEN STATE DECISIONS

Petitioners claim that this Court should grant a writ of certiorari to resolve a conflict between decisions of the Montana, Texas and Georgia Supreme Courts. There is no conflict at all between the Georgia and Texas decisions, and in fact, the Georgia decision (*Bartow County Bank v. Bartow County Board of Assessors*, No. 37868, Jan. 6, 1982) specifically follows *Bank of Texas v. John Childs*, 615 S.W.2d 810 (Tex. Civ. App. — Dallas 1981, writ ref'd n.r.e.).

The alleged conflict with the Montana decision (*Montana Bankers Association v. Montana Department of Revenue*,

580 P.2d. 909 (1978), is revealed as more a state-law conflict when the decisions are examined closely. The Montana decision (a 3-2 vote) states (p. 911) that the issue presented is whether under Montana law a Montana *bank* is entitled to deduct United States obligations owned by it on assessment day, clearly recognizing that the Montana tax was a tax on banks and their assets. There was a factual difference in the Montana statute and the Texas statute. The Montana statute made the banking corporation liable to the State for the payment assessed against the shares. No liability was imposed on the shareholder, although the statute did authorize the banking corporation to recover from the owners of the shares any taxes paid on the shares and gave the banking corporation a lien to secure the payment. The Montana statute provided[7] in this regard as follows:

> "* * * The bank or banking corporation in which such shares are owned shall be liable for the payment of taxes assessed against such shares, and such taxes shall be payable by and may be collected from such bank or banking corporation in the same manner and under the same penalties as other taxes; provided that such bank or banking corporation may recover from such owners shares any taxes so paid on such shares, and shall have a lien therefor upon such shares and upon any dividends accrued or to accrue thereon." Section 84-4605, R.C.M. 1947.

The Texas law, on the other hand, is a tax on shareholders by statute (Tex. Rev. Civ. Stat. Art. 7166) and by case law (*City of Marshall v. First State Bank of Marshall*, 127 S.W. 1083, 1086 (Tex. Civ. App. 1910, writ ref'd). The

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[7] *Montana Bankers Association v. Montana Department of Revenue, supra.*

tax assessor has no power to collect the tax from the bank, since the tax is not on the bank's assets, be they United States obligations or otherwise.

The law of the State of Texas has remained the same and is not affected by the federal statute which permits a corporation that pays a tax imposed on a shareholder on his interest as a shareholder to deduct the amount of tax that the corporation paid but was owed (and not deducted) by the shareholder.[8]

The holdings of our courts have been so emphatic that it is the shareholder who owes the property tax on his shares and that it is the shareholder's property that is taxed, that confusion now exists in our federal court decisions as to whether or not the bank and/or the shareholder must pay income tax when there is an IRS refund connected with a deduction of property taxes (bank shares) voluntarily paid by the bank to the State in accordance with 26 U.S.C. § 164(e). *Hillsboro National Bank v. Commissioner of Internal Revenue*, 641 F.2d 529 (7th Cir. 1981), cert. granted 50 LW 3565 (1982).

Because of this significant difference between the laws of Montana and Texas, there is no real conflict between the decisions, and nothing for this Court to resolve. If it can be said that the *Montana* decision is in conflict with the decision of the State of Texas in *Bank of Texas v. Childs*, 615

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[8]26 U.S.C. § 164(e) provides as follows:

"Where a corporation pays a tax imposed on a shareholder on his interest as a shareholder, and where the shareholder does not reimburse the corporation, then —

(1) the deduction allowed by subsection (a) shall be allowed to the corporation; and

(2) no deduction shall be allowed the shareholder for such tax."

S.W.2d 810, (Tex.Civ.App. — Dallas 1981), writ ref'd n.r.e., the latter decision, together with the decision of the Supreme Court of Georgia in *Bartow County Bank v. Bartow County Board of Tax Assessors*, No. 37868 (Ga. Jan. 6, 1982), clearly show that any question created by the *Montana* case is not substantial.

II. THE RIGHT OF STATES TO TAX SHAREHOLDERS OF BANK STOCK ON THE VALUE OF THE SHARES WITHOUT ANY DEDUCTION FOR UNITED STATES OBLIGATIONS OWNED BY THE BANK IS FULLY ESTABLISHED.

In 1866, this Court decided *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866). In that case, the Court announced the rule that a tax upon owners of shares of stock in a corporation is not a tax on United States obligations which the corporation owns. This rule was affirmed in *Home Savings Bank v. Des Moines*, 205 U.S. 503 (1907), and reaffirmed in *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143 (1955), and was codified as R.S. 5201 (12 U.S.C. § 548).

At the same time, it was clear that even an *indirect* tax on United States obligations was prohibited. *The MacAllen Company v. Massachusetts*, 279 U.S. 620, 629 (1929), although the above decisions made it clear that the bank stock tax was not such an indirect tax on such obligations.

The Court posed the question in *Van Allen v. The Assessors*, 3 Wall, 573, 582 (1865):

> "The main and important questions involved and one on which it had been argued at great length with eminent ability is whether the state possesses the power to authorize the taxation of the shares of the national

> banks in the hands of stockholders where the capital is wholly invested in stock and bonds of the United States."

The Supreme Court held in answering the question that:

> "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his portion of the property that may remain of the corporation after the payment of its debt. This is a distinct independent interest or property held, by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen on referring to it." *Van Allen*, supra, at 584.

The Court since then has reaffirmed the decision several times. *Mercantile Bank v. New York*, 121 U.S. 138 (1887). The principle was restated in *Home Savings Bank v. City of Des Moines*, 205 U.S. 503, 516 (1907), holding:

> "But another line of cases cannot so easily be dismissed. They are relied upon by the Supreme Court of Iowa and the respect due to the opinion of that court demands that the reasons why we think those cases do not apply to the case at bar should be fully stated. These cases relate to the right of the State to tax at their full value shares of stock as the property of the shareholders. Although the States may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of the national securities held by the corporation whose

shares are taxed. The right to tax the shares of national banks arises by Congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the State requires no leave to tax the holdings of its own corporations."

The Court further held that:

"The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporations." *Home Savings Bank*, supra, at 516.

The United States Supreme Court has been called upon to decide whether or not a statute purporting on its face to levy a tax on the property of a stockholder and a trust company constituted a tax on the shares as such or upon the assets of the company. Even though the value of the shares was measured by the capital, surplus and undivided profits, the United States Supreme Court upheld the statute as being a tax on the shares, as follows:

"As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the shareholder, represented by the shares he owns. The State courts, and the local federal court, have held the imposition a tax upon the shares. The history of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion. We are of the opinion that the tax is one upon the shares as such and not upon the assets of the company." *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506, 512-513, (1938).

Therefore, in the case at bar, the banks cannot avoid the tax by claiming it indirectly taxes the federal obligations just because the banks hold federal securities, since the tax is upon the shares as such and not upon the assets of the

company. The separate property right of the shareholders is the subject of the tax and not the assets of the corporation.

The Petitioners have confused the formula used by the Tax Assessor to arrive at the cash value of the stock (as required by Art. 7166, V.A.T.S.) with the provisions of the statute. In doing so, the Petitioners discuss at length "a tax measured by net assets". (Page 11 of Petition for Writ of Certiorari). An examination of the Texas statute reveals that it is neither a tax on net assets nor a tax "measured by net assets". It is a tax on the actual cash value of the shares less the value of the bank's real estate which is taxed separately. Therefore, those who own the bank, the shareholders, only have their property ownership interest taxed once since the real estate assessed separately to the bank is deducted from the value of the shares. The Petitioners do not contend that the actual cash value of the stock (less the real estate) is less than the assessed value arrived at by the Tax Assessor. The evidence clearly indicates that the cash value in the marketplace of the shares of stock is higher than the value arrived at by the Tax Assessor using the equity capital formula.[9]

Petitioners misunderstand the affect of the various amendments to 12 U.S.C. § 548, although they recognize that for many years that statute permitted the taxation of bank

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[9]For example, the Statement of Facts in *Bank of Texas*, supra, p. 193-194, shows that stock was selling for $9.00 per share. At the time of the sale the book value of the stock had increased from $5.85 per share to $7.00 per share, or an increase of $1.15 per share. Subtracting $1.15 from the $9.00 per share would leave a value of $7.85 per share, or $2.00 per share higher than the figure the County placed on it. Although all stockholders in the Bank of Texas were parties to this cause, and some had purchased their stock at the end of 1978 or first of 1979, none of them testified that they paid less than $9.00 per share. Certainly, none claimed to have purchased the stock for less than the $5.85 per share value the County placed on the stock.

shares. An examination of the amendments readily reveals that the authority continues to exist. The statute was amended only in 1868, 1923, 1926, and 1969.

From 1864 through 1923, States could tax (in addition to real property) only the value of shares of capital stock of national banks located within their borders. Beginning in 1923, a State could choose any one of three bases. It could tax the shares, or include dividends in the income of the shareholders under an individual net income tax, or tax the net income of the national banking association. In 1926, another option was added: a State could choose, instead of the other measures, a franchise or excise tax according to or measured by the entire net income of the national bank. This enabled States to include tax-exempt interest in the tax base. Moreover, States were now permitted to tax national bank dividends to the stockholders under specified conditions. That is, if a State which imposed a tax on net income or according to or measured by net income of national banks, also applied such as income, franchise, or excise tax on other business corporations and taxed the income of individuals, it could tax individual shareholders on dividends they received from (1) national banks within the State if dividends received from domestic corporations were likewise taxed, and (2) national banks located outside the State if dividends from other foreign corporations were likewise taxed.

In each version of this statute, limits were established to prevent taxation of shares, dividends, or income at higher rates than were imposed on comparable subjects to taxation. Whichever option a State selected, its authority to tax national banks or their shares was limited to banks with their principal offices within the State. The only exception was the 1926 provision permitting taxation of resident shareholders on dividends received from out-of-state national

banks. (Page 10 of State and Local Taxation of Banks, Part II, Report of a Study Under Public Laws 91-156 and 92-213, Prepared by the Board of Governors of the Federal Reserve System and the Committee on Banking, Housing and Urban Affairs, United States Senate).

It is clear then that neither 12 U.S.C. § 548 nor 31 U.S.C. § 742 has limited or removed the consent of Congress to the taxation of bank shares. In addition to the other methods of taxation authorized by Section 5219, the taxing authority could now impose a tax on national banks, to the same extent and in the same manner that they have the right to tax state banks, and that the new statute has broader language and granted expanded taxing authority to allow states to impose the additional allowed taxes. (1969 U.S. Code Cong. and Ad. News, p. 1597).

As a matter of fact, the 1969 amendment of 12 U.S.C. § 548 was ten years after the passage of the 1959 amendment to 31 U.S.C. § 742.

31 U.S.C. § 742 is clearly applicable to federal securities owned by the bank but Article 7166, V.A.T.S., does not purport to tax the property owned by the bank. The United States Supreme Court noted this difference in *Society for Savings in the City of Cleveland, Ohio, v. Bowers*, 349 U.S. 143 (1955), and noted that authority to tax bank shares was reached in part,

> "... on the theory that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets, so that a tax on the stockholders' interest is not a tax on the federal obligations which are included in the corporate property. This rationale has been carried over to cases involving stock of state-created banks, and thus a tax on their shareholders, though measured by corporate assets which include federal obligations, is held not to offend

> the rule immunizing such obligations from state taxation."

Petitioners argue (on page 14 of their Petition) that the lower court's interpretation of § 548 is erroneous and that said Section, as now amended, does not consent to the taxation of bankshares. Petitioners' position is contrary to the the Congressional history of the statute. The Senate debate clearly shows the intent. Senator Tower's remarks in the Congressional Record — Senate, December 12, 1969, page 38634, included the statement that:

> "... the necessity for new sources of State revenue and the unpopularity of the presently unwarranted immunities of national banks militate for rapid action to clear national banks for new taxes such as sales taxes, documentary taxes, and motor vehicle taxes. The 1970 provision does this adequately, and hence I support the conference report in that respect."

While discussing this same bill in the Senate on Nov. 21, 1969, Senator Proxmire states as follows:

> "The purpose of the bill is to try to give the States an opportunity to tax the banks in those States on an equitable basis ... Incidentally, the Committee is in full accordance with the principle that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure. Accordingly, the Committee agrees in principle with the objective of the bill passed by the House of Representatives." Cong.Rec. 35399 (Nov. 21, 1969).

Congress could hardly be more explicit in expressing the continued authority of the states to impose taxes which were permissible under the old statute.

The Court of Civil Appeals noted that this interpretation is confirmed by the Report prepared by the Board of Gover-

nors of the Federal Reserve. *Bank of Texas, et al. v. John Childs, et al.*, 615 S.W. 2d 810 at 825.

In the interim period from 1969-1973, a temporary prohibition against intangible personal property taxes was in effect, but the Senate Report No. 91-530, states that:

> "The committee wants it clearly understood that the prohibition ... is not a prohibition against the *continued* imposition of any tax under the authority of Section 5219 as it now reads." (U.S. Code Cong. & Ad. News, 1969, p. 1596).

The Report could hardly be more explicit in expressing the continued authority of the states to impose taxes which were permissible under the old statute.

This amendment had no effect on the tax in Texas since Texas had, since the enactment of Article 7166, always taxed state banks and national banks alike. The interim period was to allow those states,

> "... such as Missouri, in which the State legislation concerning taxation of banks has made specific reference to Section 5219 of the Revised Statutes...." (p. 1597),

time to "... effect the necessary state statutory changes," (p. 1597) because the committee was concerned that for those particular states, if they were not given such time to end the specific reference to 5219,

> "... the taxing authority under existing State legislation might in some way be impaired." (p. 1597).

Since Texas had no such mention in its Article 7166, it was not affected by this interim provision.

The amendment to R.S. 5219 in no way limited the right of the State of Texas to continue to impose a tax on bank

shares, both state and national, as it had since the enactment of Article 7166 in 1885.

The Court in *Bank of Texas*, supra. has found only that the 1959 amendment to 31 U.S.C. § 742 did not change the law and, therefore, any Congressional intent embodied in the law is the same which the law has carried without reversal since the National Banking Act of 1864. That intent and purpose has been stated in *Bank of California, National Association v. Richardson, Treasurer of the State of California*, 248 U.S. 476 at 483:

> "... preservation of the taxing power of the several States so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and affect remain liable to state taxation."

It would be astonishing indeed if Congress had, without the barest mention in the legislative histories of such intent intended by these amendments to 31 U.S.C. § 742 and 12 U.S.C. § 548 to withdraw from the reach of state taxation assets which constitute a large enough portion of bank assets to effectively abolish the tax, with the staggering consequence on local governments, homeowners, and business owners such an action would have.

A statute granting the exemption is to be construed most strongly against the taxpayer. All presumptions are in favor of the taxability of the property or the taxing authority. This rule is accepted in most, if not all, jurisdictions. In a suit asking for a refund of capital gains tax, the United States Court of Claims held:

> "It must be remembered that the statutory exemption for tax purposes are a matter of legislative grace, and must be strictly construed." *Lutkins v. United States*, 312 F.2d 803, 805 (1963).

Similarly, the United States Court of Appeals, for the District of Columbia, had held:

> "It is true, of course, that exemptions from taxation are to be strictly construed against those claiming the exemption as we have previously observed." *Conference of Major Religious Superiors v. District of Columbia*, 348 F.2d 783, 785 (D.C. Cir. 1965).

The 1959 amendment of 31 U.S.C. § 742 was only meant as a clarification of the existing law. This amendment was attached to a bill dealing with a new issue of Series E and H Savings Bonds, and its legislative history gives a concise summary of the bill which shows there was no intent to change the law as to taxation of bankshares:

> **"Senate Report No. 909**
>
> • • •
>
> **I. Summary of Bill**
>
> This bill makes a number of changes in the laws relating to savings bond interest rates and other aspects of debt management.
>
> First, the bill permits the maximum interest rate (or investment yield) limitation of 3.26 percent on series E and H savings bonds to be exceeded where there is a finding by the President that the national interest so requires. The bill also authorizes increasing the interest rates on outstanding series E and H savings bonds. In this case also, the existing maximum limitation of 3.26

percent on these bonds may be exceeded but only in the case of a finding by the President that the national interest so requires.

Second, the bill as amended adds a new section to the Internal Revenue Code providing for nonrecognition of gain or loss on the exchange of U.S. savings bonds when so provided by regulations. This is intended to aid the Government in its attempts to achieve a better balance in the debt structure by facilitating the refinancing of outstanding securities in advance of their final maturities.

Third, the bill authorizes the issuance of obligations of the United States to Government trust funds at the issue price, whether or not at par. Under existing law in the case of certain trust funds these obligations may be issued to the funds only at par.

Fourth, the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes.

Fifth, the bill relieves from liability to the U.S. Government agents who erroneously paid U.S. bonds if they did not receive written notice from the United States within 10 years from the date of the erroneous payment." (Senate Report No. 909, U.S. Cong. & Adm. News '59-174, page 2769).

The report then points out the reason for the amendment to be:

"D. CLARIFYING EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION

Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on United States obligations from taxation by or under State or local authority. *It has been pointed out to your committee,*

> *however, that one state has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable income is determined.* The bill (Sec. 105) makes clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (emphasis added) 1959 U.S. Code Cong. and Ad. News, 2773.

In the Congressional Record- House, 1959, p. 18157, Congressman Mills said that the bill is "a reaffirmation of the exemption from certain local taxes on Federal Bonds." It is clear then, that the bill did not *change* the law but merely reaffirmed it.

In construing the application of exemption statutes, the United States Supreme Court has held:

> "However, this amendment served only to clarify the original provisions for exemption, without more. Unless resort is had to enlargement by implication, this exemption means only that the proceeds or benefits of a War Risk Policy are exempt from taxation. Exemption from taxation does not rest upon implication." *United States Trust Company v. Helvering*, 307 U.S. 57, 59-60 (1939).

That ruling was reaffirmed by the Supreme Court in a case concerning the taxability of Indian Land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

In determining the legislative intent of Congress about this 1959 amendment, it is useful to remember that in 1969, when amending 12 U.S.C. § 548, Congress was careful to continue the authority to tax bank shares, which would have

been pointless if the 1959 amendment had effectively abolished the tax. *Bank of Texas, et al., v. John Childs, et al.*, supra at 825. See generally Senate Report 91-530, 1969 U.S. Cong. and Ad. News 1954, discussed further below.

The 1959 amendment to 31 U.S.C. § 742 did not expand the law or raise any new prohibitions on taxation. The prohibition against indirect taxation, and taxation on interest, of federal securities has been the controlling principle long before 1959.

> "... the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or what is the same thing, the income derived there from, directly or indirectly ... Words which, literally considered, impose a tax on something else ... may nevertheless be adjudged to lay a tax on the [securities]. *The MacAllen Company v. Massachusetts*, 279 U.S. 620, 629 (1929).

The *MacAllen* case demonstrates that long before 1959, it was settled law that an indirect tax on federal obligations was illegal. At the same time, there was no question that this ban did not apply to the bank stock tax. *Home Savings Bank v. City of Des Moines*, 205 U.S. 503 (1907).

Petitioners also pay little attention to the interaction of R.S. 3701 and R.S. 5219. In 1959, when R.S. 3701 was amended, R.S. 5219 (12 U.S.C. § 548)) specifically contemplated a tax on bank shares. (See 1926 version p.54a in Petition for a Writ of Certiorari). R.S. 3701 by its terms ("Except as otherwise provided by law...") required that it be considered in light of R.S. 5219. The predecessor version of R.S. 5219 was the statute under consideration in *Van Allen*, supra. Since the statute continued in effect in 1959 without significant change, the 1959 amendment to 31 U.S.C. § 742 *must* be read to have no effect on the law concerning taxation of bank shares. Otherwise, the opening phrase

"Except as otherwise provided by law" will have been disregarded.

In any event, statutes on the same subject must all be given effect if possible. *Morton v. Mancari*, 94 S.Ct. 2473 (1974).

While Petitioners claim (on page 14 of the Petition for Writ of Certiorari) that the lower court "ascribes to Congress an astonishing intent — that the proscription of § 742 apply to all business entities except banks," that court's decision contains no such language — it does correctly hold that § 548 was a more specific statute than § 742 and that ordinary rules of construction would require that § 548 be read as an exception to § 742 even if, as the Court states (615 S.W.2d at 820) "it might be contended" that the amendment to § 742 conflicts with § 548. See *Radzanower v. Touche Ross and Company*, 426 U.S. 148, 153-156 (1926).

This is not the first time that banks and their holding companies have attempted to merge the distinction between banks and their shareholders so as to escape taxation. *Bullock v. National Bancshares Corporation*, 584 S.W.2d 268 (Tex. 1979, cert. den. 100 S.Ct. 667).

III. THE COURT HAS NO JURISDICTION TO CONSIDER WHETHER OR NOT THE "BORROWING CLAUSE" HAS BEEN VIOLATED, BUT IN ANY EVENT THERE HAS BEEN NO DISCRIMINATION AGAINST UNITED STATES OBLIGATIONS.

Petitioners raise a defense based on alleged discrimination under United States Constitution, Article I, § 8, cl. 2, the "borrowing clause" for the first time in this Petition for Writ of Certiorari. They did not claim this defense in the

lower courts. Therefore, this Court does not have jurisdiction to consider this question. *Giordano v. United States*, 394 U.S. 310 (1969); 28 U.S.C. § 1257. However, even if jurisdiction existed, the argument is without merit.

The existence or amount of United States obligations owned by the bank has no effect on the taxes owed by the shareholders. The bank may increase or decrease its ownership of such obligations, and the taxes paid by the owners of the corporate stock will not vary, and the equity capital accounts are not affected (SF 383-386 in No. 20915). Thus actual value does not change. Several bankers so testified in answer to hypothetical questions. (SF 1050 in No. 20915). It is not even necessary for the tax assessor to know whether the bank owns any such obligations.

Petitioners claim that the bank stock tax discriminates against United States obligations by deducting from the actual value of the stock a pro-rata amount for real estate taxes paid by the bank. They claim that increasing real estate ownership lowers the share tax and apparently thereby conclude that United States obligations are made a less attractive investment.

Petitioners overlook the fact that the amount of real estate a bank may own is severely limited by both state law (Tex. Rev. Civ. Stat. Art. 342-501 et seq). and federal law (12 U.S.C. § 29). (These statutes are included in Appendix E). These statutes set limits on the bank's real estate holdings which prevent the kind of discrimination alleged by Petitioners.

The only conclusion that can be reached is that Art. 7166 does not make federal obligations a less attractive investment than real estate. The evidence shows banks do not invest in

real estate to any significant degree. There was no testimony or proof offered by Petitioners that the banks even considered the property tax imposed by Art. 7166 when making investment decisions. It requires no evidence to see that real estate and United States obligations are entirely different forms of investment, and in the absence of proof, there is no basis for supposing that they are competitors for the same bank dollars. They are purchased for different reasons and with different goals. Further, it is not reasonable to believe, in the absence of proof, that the bank officers would use the bank's investment portfolio in a manner designed to keep the owners of the corporate stock from paying property tax on the stock without regard to the bank's best interest.

These facts do not lead to the conclusion that United States obligations are discriminated against or made a less attractive investment.

Petitioners argue that *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935) prohibits *any* deduction when valuing stock unless federal obligations are likewise deducted. Regardless of the interpretation placed on the holding of the case by Petitioners, the most authoritative interpretation is by the Court itself. In explaining the holding in the case, the Court later said:

> "We held further that the exclusions from the base of a proportion of the value of *tax-exempt* shares of Pennsylvania corporations, and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter." *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 (1938) (emphasis added).

It was this refusal of Pennsylvania to grant equal treatment to competing investment (tax-exempt Pennsylvania

stocks and tax-exempt United States securities) that led to the first *Schuylkill* decision. This factual setting is not comparable to the one now before this Court.

Petitioners likewise seriously misconstrue the holding in *Werner Machine Company v. Director of Division of Taxation*, 350 U.S. 492 (1956). *Werner* holds only that, in determining the legality of a franchise tax on a corporation, if the franchise tax remains the same regardless of the composition of the assets of the corporation, no claim for discrimination can be sustained. This is a far cry from the holding implied by Petitioners. Petitioners attempt to use *Werner* to prop up their supposition that bank-owned United States securities are somehow discriminated against when stockholders who are assessed property taxes on the value of their stock are allowed the equivalent of a credit for property taxes already paid by the bank. *Werner* does not so hold.

The factual and legal situation here cannot be said to be a "hostile and oppressive discrimination" as required by *Lehnhausen v. Lake Shore Auto Parts Co.*, 93 S.Ct. 1001 (1973).

There is no evidence whatsoever that any stockholder was subject to a greater tax burden because the stockholder owned any United States obligations. There was likewise no evidence that the Banks were subject to a greater tax burden because they owned United States obligations. The only tax on the bank is real estate tax. How much or how little of the Bank's assets are United States obligations makes no difference in the amount of real estate taxes paid. Increases or decreases in the amount of the obligations owned by the Bank do not change the taxes it is required to pay. The tax assessor did not even inquire as to the presence, absence

or amount of United States obligations. The assessed value of the stock was based on the actual cash value (per Art. 7166), and as already seen, no attention was paid to any United States obligations. These obligations in question are owned by the bank, not the shareholders who owe the tax.

Although Petitioners claim that the taxing mechanism discriminates against Uinted States obligations in favor of real estate, there was no proof at trial of such proposition, and in fact, the opposite is just as likely to be true. Since the bank pays taxes only on real estate, it is more likely that the bank will *limit* its real estate holdings to cut its tax bill, and concentrate its investment holdings on other assets on which it owes no tax. Thus, if it can possibly be said that real estate and United States obligations are competing investments (of which there is no proof), then United States obligations are favored rather than disfavored.

Petitioners rely on *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 296 U.S. 113 (1935), (which involved different facts), and overlook the fact that the 1935 *Schuylkill* case was again considered by the Supreme Court in the 1938 case of *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506 (1938). In this case the United States Supreme Court held that a tax on the shares of the trust company was not a tax on the assets of the company, even though the value of the shares was measured by the capital, surplus and undivided profits. In that case, the Court held:

> "As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The State courts and the local federal court, have held

the imposition a tax upon the shares. The history of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion. We are of the opinion that the tax is one upon the shares as such and not upon the assets of the company." p. 512).

It has always been the declared intention of 12 U.S.C. § 548 (R.S. 5219) that real estate was to be taxed separately and apart from the value of the stock. *Bank of California National Association v. Richardson*, 248 U.S. 476 (1918), *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923). As has been previously shown, nothing in the amended 12 U.S.C. § 548 or its legislative history limits the right to continue to use this method of taxation, so long as both state and national banks are taxed alike.

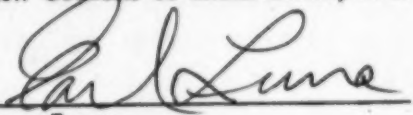
Petitioners have not demonstrated any unlawful discrimination against United States obligations and the Court of Civil Appeals was correct in so holding. Granting a homestead exemption discriminates, but it, like the case at bar, is not unlawful.

For these reasons, there was no unlawful discrimination which could be found by the trial court or the Court of Civil Appeals against United States obligations, and Petitioners were not entitled to any judgment so holding.

CONCLUSION

There is no basis for granting a writ of certiorari. The issues presented here have previously been decided by this Court adversely to Petitioners, and no reason has been shown to overturn those decisions. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,
LAW OFFICES OF EARL LUNA, P.C.



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ATTORNEY FOR RESPONDENTS
DALLAS COUNTY, TEXAS, ET AL.

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated:

I, Earl Luna, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Respondents Dallas County, et al., in all proceedings had in the Courts below.

I further state upon oath that on the 15th day of April, 1982, I served copies of the foregoing Opposition to Petition for Writ of Certiorari on Petitioners, American Bank and Trust Company, et al., by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit:

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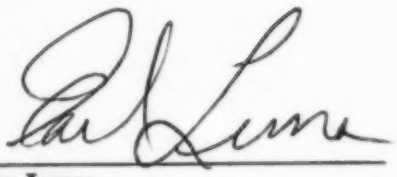
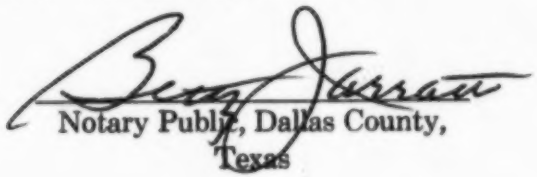


EARL LUNA

SUBSCRIBED AND SWORN To before me by the said Earl Luna, on this the 15th day of April, 1982.



Notary Public, Dallas County, Texas

BANK OF TEXAS et al., Appellants,

v.

John CHILDS et al., Appellees.

No. 20660.

Court of Civil Appeals of Texas,
Dallas.

Jan. 23, 1981.

Rehearing Denied May 1, 1981.

A state banking corporation and its shareholders brought suit against the county, its tax assessor-collector, and the board of equalization for mandamus, injunction, and declaratory relief against the tax on the securities held by the bank. The 162nd District Court, Dallas County, Dee Brown Walker, J., upheld the tax and denied the relief sought, and plaintiffs, appealed. The Court of Civil Appeals, Guittard, C. J., held that: (1) the statute authorizing imposition of a tax on bank shares fell within the express exception to the statute exempting intangible property from taxation and was not repealed by implication; (2) subject statutes were not unconstitutional because they deliberately omitted taxation of shares of nonbanking corporations and most intangible personal property and were not violative of equal protection; (3) the Congress did not intend by 1959 amendment to the exemption statute to withdraw in any respect its consent to state taxation of national or state bank shares; (4) the tax plan of the county with respect to the bank shares was not illegal because of its failure to deduct the federal securities held by the bank from its net assets in determining the value of its shares; (5) the tax did not constitute an unlawful discrimination against federal securities; and (6) the 1969 revision of the federal exemption statute did not operate to withdraw the consent of Congress to state taxation of bank shares to the extent of federal securities held by the bank.

Affirmed.

Robertson, J., concurred and filed opinion.

1. Statutes 223.1

Since repeals by implication are not favored, old and new statutes that are not positively repugnant will each be construed so as to give effect to both, if possible.

2. Taxation 113

Statute authorizing a tax on shares of bank stock, though not at a greater rate than other money capital in hands of individual, falls within express execption to statute exempting intangible property from taxation and is not repealed by implication. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

3. Statutes 159

If statutes have conflicting provisions, the earlier statute will be held to be repealed only to the extent of the conflict, and otherwise will be construed as remaining in effect.

4. Taxation 113

Statute excluding bank shares from the exemption of intangible property from taxation would have the effect of repealing only the last sentence of the bank tax statute referring to other moneyed capital in the hands of individuals if that sentence would otherwise extend the exemption to bank shares. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

5. Taxation 42(1)

There was no evidence that the tax on bank shares assessed by Dallas County was illegal on the ground that the bank shares in question were taxed at a greater rate than other moneyed capital in hands of individuals. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

6. Taxation 41

Provision of Constitution that all real property and tangible personal property in the state shall be taxed in proportion to its value must be interpreted as meaning that

the legislature may tax intangible property or exempt it or tax certain classes of intangible property and exempt others. Vernon's Ann.Const.Art. 8, § 1; U.S.C.A.Const. Amend. 14.

7. Taxation 41

Statutes which provide authority for imposition of a tax on bank shares are not unconstitutional because they deliberately omit taxation of shares of nonbanking corporations and most intangible personal property. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

8. Taxation 42(1)

A state tax law that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. U.S.C.A.Const. Amend. 14.

9. Constitutional Law 229(1) Taxation 41

Since bank shares form a class of stock that, for tax purposes, may reasonably be distinguished from other intangible property, including other shares of stock, statutes which form a basis for imposition of a tax on bank shares are not violative of equal protection because no shares of other corporations are so taxed. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

10. Taxation 42(2)

If a state decides to give more favorable tax treatment to shareholders in corporation that pay franchise taxes than to shareholders in corporations that do not pay such taxes, such a classification may not be regarded as arbitrary or unreasonable, and the constitutional principle of equality is not offended. Vernon's Ann.Civ.St. arts. 7150.6, 7166.

11. Taxation 11

Congress did not intend by the amendment to the federal exemption statute to withdraw in any respect its consent to state taxation of national or state bank shares. 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

12. Taxation 4, 11

State taxation of state bank shares as well as of national bank shares, falls within original exception to exemption provided by federal statute. 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

13. Statutes 223.1

When acts of Congress are in apparent conflict, it is the duty of the courts to regard each as effective in the absence of a clearly expressed congressional intent to the contrary.

14. Taxation 11

The federal exemption statute both before and after amendment must be construed as a specific statute with respect to state taxation of bank shares and, therefore, as prevailing as against a more general exemption of federal securities provided by the consent statute. 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

15. Statutes 223.4

A more specific statute will be given precedence over a more general one regardless of their temporal sequence.

16. Statutes 223.4

The effect of regarding the more specific statute as controlling is to interpret the provisions of the specific statute as an exception to the general statute.

17. Taxation 11

Since it is apparent that when Congress enacted the federal exemption statute, it was focusing on the particular question of the taxation of bank shares, and that when it amended the consent statute, it was focusing on the general exemptions of federal securities, including both principal and interest, from state and local taxation, and since no clear intention was manifested by the amendment to extend the exemption to bank shares to the extent of the bank's holding of federal securities, the apparent intention was to leave unimpaired the consent to such taxation. 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

18. Taxation 11, 386(2)

The plan conceived by Dallas County for imposing a tax on bank shares was not invalid because of its failure to deduct the federal securities held by the bank from its net assets in determining value of its shares. Vernon's Ann.Civ. St. arts. 7150.6, 7166; 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

19. Taxation 40(8)

The tax on bank shares assessed by Dallas County did not constitute an unlawful discrimination against federal securities because it was levied on the difference between actual cash values of each share and the proportionate amount per share at which the bank's real estate was assessed for taxation. Vernon's Ann.Civ.St. arts. 7150.6, 7166; 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

On Appellants Motion For Rehearing

20. Taxation 11

The 1969 revision of the federal exemption statute was not intended to withdraw the consent of Congress to state taxation of bank shares to extent of federal securities held by the banks. Vernon's Ann.Civ.St. arts. 7150.6, 7166; 12 U.S.C.A. § 548; 31 U.S.C.A. § 742.

Peter S. Chantilis, Cecilia S. Hufstedler, Dallas, for appellants.

Earl Luna, Randel B. Gibbs, Dallas, for appellees.

Before GUITTARD, C. J., and AKIN and ROBERTSON, JJ.

GUITTARD, Chief Justice.

ON MOTIONS FOR REHEARING

The principal question in this case is the validity of the tax on bank shares assessed by Dallas County under article

7150.6 and 7166 of the Texas Revised Civil Statutes.[1] The suit was brought by the Bank of Texas, a state banking corporation, and all its shareholders, against the county, its tax assessor-collector, and board of equalization, for mandamus, injunction, and declaratory relief, alleging that the county's tax plan of 1979 is illegal under state law, or if not illegal, unlawfully discriminates against holders of bank shares because no such tax is assessed against other intangible property including other moneyed capital in the hands of individuals. The bank and its shareholders further contend that the assessment is illegal under federal law because it considers the value of obligations of the United States held by the bank in computing the tax, contrary to the federal statute exempting such obligations from taxation.

After a trial without a jury, the trial court upheld the tax and denied the relief sought. We affirm.

State Law

We consider first the contention that the county has no authority to tax shares of bank stock because article 7150.6, which exempts most intangible property from taxation, has the effect of repealing the tax on bank shares imposed by article 7166. Since article 7166 is not expressly repealed, we must examine the two statutes to determine whether the legislature intended to impliedly repeal the tax on bank shares. We conclude that no such repeal was intended by the legislature.

Article 7166 is as follows:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or

[1]These articles were repealed by Section 6(a)(1) of the Property Tax Code, effective January 1, 1982. Tex.Laws 1979, ch. 841, at 2329.

some other officers of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. Tex.Rev.Stat.Ann. art. 7166 (Vernon 1960).

The pertinent provisions of article 7150.6 are as follows:

(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.

(b) Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166, or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes) . . . Tex. Rev.Civ.Stat. Ann. art. 7150.6 (Vernon Supp. 1980).

The bank and its shareholders contend that since article 7166 provides that bank shares may not be taxed at a greater rate than other moneyed capital in the hands of individuals,

and article 7150.6 expressly exempts such other moneyed capital from taxation, 7166 no longer imposes a tax on bank shares. They acknowledged in oral argument that this contention means that article 7166 has been repealed by implication.

[1, 2] We do not agree that article 7166 was repealed by article 7150.6. Since repeals by implication are not favored, old and new statutes that are not positively repugnant will each be construed so as to give effect to both, if possible. *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex.1964). We have no difficulty in construing these two statutes so as to give effect to both. In fact, article 7166 falls within an express exception to the exemption of intangible property from taxation provided by article 7150.6(a). It would be clearly contrary to the legislative intent to hold that an earlier statute expressly specified in an exception to the later statute is repealed by the later statute.

The only provision of article 7166 that is arguably repealed by article 7150.6 is the last sentence of article 7166, which provides:

> Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against all other moneyed capital in the hands of individuals.

[3] If the intent of article 7150.6 is to repeal all taxes on "other moneyed capital in the hands of individuals" but to retain the tax on bank shares, as the reference to article 7166 above quoted may no longer be effective. This interpretation is preferable to ascribing to the legislature the intent to repeal article 7166 in its entirety because of the express exclusion of the bank shares tax in article 7150.6(b). Moreover, repeal of only the last sentence would be supported by the rule that when two statutes have conflicting provisions, the earlier statute will be held to be repealed only to the extent of the conflict, and otherwise will be construed as remaining in effect. *Whittenberg v. Craven*, 258 S.W. 152,

153 (Tex.Com.App. 1924, judgmt adopted); *Texas State Board of Pharmacy v. Kittman*, 550 S.W.2d 104, 107 (Tex. Civ.App.—Tyler 1977, no writ); *Parker v. State*, 208 S.W.2d 380, 383-84 (Tex.Civ.App.), *aff'd* 147 Tex. 57, 212 S.W.2d 132 (1948). Consequently, rather than construe article 7150.6 as repealing article 7166 in its entirety, we would be required to construe it as repealing only the last sentence.[2]

[4] However, it may not be necessary to go so far as to hold that the last sentence of article 7166 has been repealed by article 7150.6. Subdivision (b) of article 7150.6 enumerates several statutes in addition to article 7166 that are excluded from the exemption of intangible property from taxation. We need not determine whether any of these other statutes impose a tax on "moneyed capital in the hands of individuals." There is no contention here that any of them does impose such a tax, but if any of them do, the last sentence of article 7166 may still be effective to forbid the taxation of bank shares at a greater rate than the tax imposed by any of those statutes. If none of them imposes such a tax, then the last sentence may have no effect until and unless legislation is enacted imposing such a tax.

[5] Furthermore, we note that there is no evidence in the present record that there is, in Dallas County or elsewhere, any "other moneyed capital in the hands of individuals" that is exempt from taxation under article 7150.6. Consequently, there is no evidence the tax plan of Dallas County

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[2]That construction would be reasonable in view of the fact that the provision forbidding taxing bank stock at a greater rate than "other moneyed capital in the hands of individuals," was apparently taken from section 5219 of the Revised Statutes of the United States, which authorized state taxation of shares of national banks, but not at a greater rate than "other moneyed capital in the hands of individual citizens of such State." Since the federal statute has now been amended to provide that a national bank shall be treated the same as a state bank for purposes of state taxation, 12 U.S.C. § 548 (1976), it is reasonable to suppose that the corresponding limitation in article 7166 is no longer necessary.

is illegal on the ground that the bank shares in question are taxed at a greater rate than "other moneyed capital in the hands of individuals."

For the reasons stated, we hold that when article 7150.6 and article 7166 are read together, and effect is given to both to the extent possible, a tax is still imposed on bank shares. Our holding in this respect is not contrary to *Childs v. Reunion Bank*, 587 S.W.2d 466, 470 (Tex.Civ.App.—Dallas 1979, writ ref'd n. r. e.). That case concerned taxes assessed before the exemption provided by article 7150.6 became effective, and this court held that since the record showed that numerous classes of taxable property, including other moneyed capital in the hands of individuals, were subject to taxation, but were not included in the tax rolls, the assessment on bank shares was in violation of article 7166. That holding cannot control this case because of the provisions of article 7150.6, which, as already explained, by its express reference to artcle 7166, excludes bank shares from the exemption of intangible property, and, consequently, would have the effect of repealing only the last sentence of article 7166, if that sentence would otherwise extend the exemption to bank shares.

Inequality of Taxation

[6, 7] The bank and its stockholders contend further that if a tax is imposed on bank shares by articles 7150.6 and 7166, these statutes are unconstitutional because they deliberately omit taxation of shares of non-banking corporations and most intangible personal property, contrary to article VIII, section 1, of the Texas Constitution, which provides, "Taxation shall be equal and uniform." The county responds that under article VIII, section 1, as amended effective January 1, 1979, taxation of intangible property is permitted, but not required. We agree with the county's interpretation. Formerly, this section provided, "All property in this State ... shall be taxed in proportion to its value ..." As amended, it provides, "All real property and tangible personal property

in this State ... shall be taxed in proportion to its value ..." The amendment adds further that the legislature "may provide for the taxation of intangible property." We interpret the amendment to mean that the legislature may tax intangible property or exempt it, or tax certain classes of intangible property and exempt others.

We recognize that section 1 as amended still provides, "Taxation shall be equal and uniform." With respect to intangible property, this requirement applies only to property which the legislature decides to tax, and permits reasonable classification for tax purposes, so long as the taxes are equal and uniform within each class. *See Hurt v. Cooper*, 130 Tex. 433, 110 S.W.2d 896, 900-01 (1937); *Grayson County State Bank v. Calvert*, 357 S.W.2d 160, 162 (Tex. Civ.App.—Austin 1962, writ ref'd n. r. e.).

[8] The further contention is made, however, that articles 7150.6 and 7166 deny equal protection of the laws, and, therefore, also offend the equal protection clause of the Fourteenth Amendment to the Constiution of the United States because no shares of other corporations are so taxed. This contention raises the question of reasonable classification. The authorities recognize that the states have a wide leeway in making classifications which, in their judgment, produce reasonable systems of taxation. *Kahn v. Shevin*, 416 U.S. 351, 355, 94 S.Ct. 1734, 1737, 40 L.Ed.2d 189 (1974). Accordingly, a state tax law that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Id.* (tax exemption of widows not applying to widowers upheld).

[9] We conclude that bank shares form a class of stock that, for tax purposes, may reasonably be distinguished from other intangible property, including other shares of stock. Banks enjoy powers and privileges not granted to other corporations. As the county points out, other corporations are subject to franchise taxes, which are not imposed on banks. Based on these differences, we cannot say that the

legislature has singled out bank shares for arbitrary and unreasonable discrimination.

This conclusion is supported by *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181, 53 S.Ct. 321, 77 L.Ed. 687 (1933), in which it was contended that a tax on state banks denied equal protection because it was not also imposed on other corporations competing with banks. The court held:

> We cannot say that the state Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business, notwithstanding actual competition between them.
>
> Mere competition between them is not enough to show two concerns must be burdened alike. The state Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious, or wholly unreasonable. *Id.* at 185-86, 53 S.Ct. at 321-322.

[10] In the present case it is also suggested that no valid discrimination can rest on the difference between banks and other corporations without repudiating the distinction between a tax on bank assets and on bank shares. The county relies on this distinction, established in *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1886), to avoid application of the exemption of federal securities held by the bank in assessing the tax on the shares. The *Van Allen* rule will be discussed in the next section of this opinion. At this point we need observe only that we cannot accept the view that even though there may be valid grounds to distinguish between banks and other corporations, bank shareholders must be treated like all other

shareholders for purposes of taxation. This is a question of equal protection rather than one of determining what property Congress has exempted from state taxation or has permitted the state to tax, such as that before the Supreme Court in *Van Allen*. If a state decides to give more favorable tax treatment to shareholders in corporations that pay franchise taxes than to shareholders in corporations that do not pay such taxes, such a classification cannot be regarded as arbitrary or unreasonable, and, therefore, the constitutional principle of equality is not offended. Consequently, we hold that the tax imposed on bank shares by articles 7150.6 and 7166 is valid and constitutional.

Exemption of Federal Securities

Another ground alleged as establishing invalidity of the county's plan for taxing bank shares is its failure to deduct the value of the federal securities held by the bank from the bank's net assets before apportioning their value pro rata in determining the value of the shares. Article 7166 provides that the real estate owned by the bank shall be separately rendered and assessed, and that all shares shall be rendered at their actual cash value, but that each share shall be assessed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed. No provision is made for a similar deduction with respect to the federal securities held by the bank.

The evidence shows that the assessed value of the shares for 1979 was determined by book value rather than market value, that is, by subtracting the bank's liabilities from its total assets, deducting the assessed value of its real estate, and dividing that net figure by the number of shares to determine the taxable value per share. There is also evidence showing that if all obligations of the United States held by the bank were deducted from the value of the net assets, nothing would remain to be divided proportionately among the shareholders. The bank and its shareholders contend that this method of assessment is illegal under

section 3701 of the Revised Statutes of the United States, 31 U.S.C. § 742 (1976), which provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The first sentence of this statute was enacted originally in 1862.[3] The second sentence was added by amendment in 1959.[4] Before the amendment, state taxation of bank shares without allowing any deduction for federal securities was upheld by a well-established line of decisions by the Supreme Court of the United States, beginning with *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866). The bank and its shareholders insist that the 1959 amendment to section 3701 changed the rule established by those decisions because the amendment extended the exemption to "every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly in the computation of the tax," with exceptions not applicable to the present case. They rely on *Montana Bankers Ass'n. v. Montana Department of Revenue*, Mont., 580 P.2d 909 (1978), which held that the 1959 amendment is unambiguous and by its plain language precludes the assessment of a tax on bank shares that requires obligations of the United States to be considered directly or indirectly in the computation of the tax.

[11] Although we originally reached the same conclusion as the Montana court, further examination of section 3701

[3]Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 346.

[4]Pub.L.No.86-346, § 105(a), 73 Stat. 622 (1959).

in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, "Except as otherwise provided by law," and also ignores another statute, section 5219 of the Revised Statutes of the United States,[5] which falls within this exception. As we shall show in the discussion following, section 5219, upon which the *Van Allen* rule is based, expressly consents to local taxation of national banks, and, by implication, also consents to taxation of shares in state banks. It has been construed in *Van Allen* and the cases following it to extend this consent to the full interest of the shareholder in shares in both national and state banks, even though the tax is measured by the bank's capital without any deduction of federal securities held by the bank. When we read the exemption statute, section 3701 as amended in 1959, together with the consent statute, section 5219, it appears to us that Congress did not intend by the amendment to withdraw in any respect its consent to state taxation of national or state bank shares.

Consideration of this question must begin with the *Van Allen* opinion itself. The main question in that case was whether the state of New York had the power to tax the shares of national banks whose capital was wholly invested in obligations of the federal government. Counsel contended that the shares were exempt, citing the exemption statute (later codified as section 3701 of the Revised Statutes of

[5]Section 5219 was originally included in the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, and was later codified as section 5219 of the revised statutes. It was also embodied in 12 U.S.C. § 548 (1964). It was amended in 1969 to provide simply that for the purpose of any federal or state tax law, a national bank "shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. § 548 (1976). We refer in this opinion to section 5219 as it existed in 1959, when section 3701 was amended, because our primary question turns on the meaning of section 3701. The 1969 amendment is evidently intended to broaden rather than restrict congressional consent to state taxation of national banks. *See* S.Rep.No.91-530, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 1594.

the United States) and also the federal government's power to borrow money, as conferred by article I, section 8 of the Constitution of the United States. The opinion of the Supreme Court does not expressly refer to either the statute or to this provision of the Constitution, but evidently considered the question in the light of both. The Court does discuss at length and quotes from the consent statute a provision of the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, which then provided that the shares of national banks should be subject to taxation by state authority, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and providing further that such a tax "shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State." 70 U.S. (3 Wall.) at 581, 18 L.Ed. at 233.

The Supreme Court first considered the question of whether the tax was invalid because no similar tax was levied on the shares of state banks. The Court pointed out that the New York statute levied a tax on the capital of state banks, but since their capital might also be invested in federal securities, which were exempt from taxation, such a tax was not equivalent to a tax on the stockholders, such as that assessed against the stockholders of national banks. Consequently, the tax was held to be invalid under that section of the consent statute providing that taxes imposed on national banks should not exceed the rate imposed on the shares in state banks.

The Court went on to say, however, that since this defect might be remedied by the state legislature, (presumably by imposing a similar tax on shares in state banks), it would consider the main question of the power of the state to authorize the taxation of the shares of national banks whose capital was wholly invested in obligations of the federal government. In deciding this question, the Court again relied on the provisions of the National Bank Act and its express consent to state taxation of such shares, and held that such a tax was valid on the ground that the Congress, in authoriz-

ing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation. This appears to be the primary ground of the opinion. As an additional ground, the Court held that the tax on the shares was not a tax on the capital of the bank because of the shareholders' separate ownership of the shares. In discussing this ground, the Court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares, saying that although Congress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act.

The *Van Allen* opinion bears directly on the question of whether the consent statute permits the state's taxing power to apply only to that portion of the shareholder's interest in the bank's capital that was not invested in obligations of the federal government. After a detailed analysis of the National Bank Act, the Court concluded that Congress had intended to make the entire interest of the shareholders subject to taxation, and observed that such a limitation on the meaning of the term "shares" would be "so grave and important a change in the use of the term that, if so intended, would not have been left to judicial construction." 70 U.S. (3 Wall.) at 588, 18 L.Ed. at 236.

The *Van Allen* decision has been repeatedly reaffirmed and regarded as "settled law" by the Supreme Court. *See, e. g., People v. Commissioners of Texas*, 71 U.S. (4 Wall.) 244, 18 L.Ed. 344 (1867); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 112-114, 44 S.Ct. 23, 26-27, 68 L.Ed. 101 (1923); *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 147, 75 S.Ct. 607, 609, 99 L.Ed. 950 (1955). In *Bowers* the Court characterized section 3701 as a legislative expression of the constitutional principle of the exemption of federal securities from state and local taxation, derived from the power of the federal government to borrow money conferred by article I, section 8, of the Constitution of the United States, and from the Supremacy Clause, article VI, clause 2.

The *Van Allen* rule was extended to shares in state banks in *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 22 S.Ct. 394, 46 L.Ed. 456 (1902). In that case a trust company organized under the laws of Ohio argued that the state tax on its shares should be computed by deducting from its capital certain federal securities because of the exemption provided by section 3701 of the Revised Statutes of the United States. The Supreme Court observed that this argument claimed a greater immunity for the shares in the trust company than section 5219 provided for shares in national banks. In response to the argument that the laws of Congress governing taxation of national bank shares were immaterial to the power of the state to tax state bank shares, the Court held:

> The contention destroys the separte individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want orf harmony. *Id.* at 115, 22 S.Ct. at 396.

As we understand the *Lander* opinion, it holds that section 5219, which by its terms consents to state taxation of national bank shares, also extends to state bank shares, and that any contrary interpretation of the exemption statute, section 3701, would bring it into conflict with section 5219. This conclusion logically follows from the *Van Allen* holding that the New York state tax on national bank shares was invalid because it imposed no equivalent tax on state bank shares. Of course, no federal consent was required for state taxation of the shares of state banks, as distinguished from national banks, except to the extent that state bank shares woud otherwise have been exempt under section 3701 because of federal securities held by the bank. Consequently, the only pertinency of section 5219 to the *Lander* case was its effect on the exemption otherwise provided by section 3701. In other words, the Court held that in order to avoid more favorable treatment of state banks than national banks, the consent provided by section 5219 for state taxation of

national bank shares, regardless of federal securities held by the bank, must apply also to state taxation of state bank shares.

These decisions demonstrate that before the 1959 amendment to section 3701, the state's authority to impose taxes on the shares of both state and national banks, valued according to the bank's assets without deducting federal securities, rested on the congressional consent provided by section 5219 as well as on the distinction between ownership of bank shares and bank assets. Therefore, we must take into consideration the language and purpose of both section 3701 and section 5219 in assessing the validity of the argument that the amendment to section 3701 changed the *Van Allen* rule. *Kokoszka v. Belford*, 417 U.S. 642, 650, 94 S.Ct. 2431, 2436, 41 L.Ed.2d 374 (1974). When the two statutes are read together, we find no irreconcilable conflict between the two. There can be no conflict in view of the initial words of section 3701, "Except as otherwise provided by law," which remained in the statute as before the amendment. This express exception obviates any difficulty that might otherwise exist in reconciling the provisions of section 5219 with the 1959 amendment to section 3701. The consent provided by section 5219 is "otherwise provided by law," and, therefore, falls within the exception to the exemption.

The original exception in section 3701 is not repealed or modified by the 1959 amendment, although other exceptions, not "otherwise provided by law," were added. One of these exceptions applies to corporate franchise taxes. Before the amendment, the exemption had been held not to apply to a tax imposed on a corporate franchise for the privilege of doing business in corporate form, though the tax was based on corporate assets (or income) without deducting federal securities (or the interest therefrom). *Educational Films Corp. v. Ward*, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400 (1931); *Home Ins. Co. v. New York*, 134 U.S. 594, 10 S.Ct. 593, 33 L.Ed. 1025 (1890). There was some inconsistency in the decisions on this point, however. *See Macallen Co. v. Massachusetts*, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874

(1929); Comment, *Share Tax, Franchise Tax and Federal Banks—the Schuylkill Trust Co. Case*, 84 Pa.L.Rev. 758, 764-66 (1936). The 1959 amendment to section 3701 cleared up this inconsistency by providing a specific exception for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations." It also provided a specific exception for estate and inheritance taxes, which, by similar reasoning, are imposed on the privilege of succession rather than on the property passing. *See West v. Oklahoma Tax Commission*, 334 U.S. 717, 727, 68 S.Ct. 1223, 1228, 92 L.Ed. 1676 (1948); *Billings v. Illinois* 188 U.S. 97, 23 S.Ct. 272, 47 L.Ed. 400 (1903); *Cahn v. Calvert*, 159 Tex. 385, 321 S.W.2d 869, 872 (1959). In neither case, however, had such an exception been established on the basis of another federal statute, as in the case of bank shares, and consequently, such taxes were not clearly embraced within the express exception provided by the original exemption statute. There was no need to add another specific exception for taxes on bank shares because that subect was "otherwise provided by law," within the original exception, which is clearly broad enough to cover such taxes which respect to national bank shares.

[12] If the 1959 amendment does not withdraw congressional consent to the taxation of national bank shares in view of the express consent still provided by section 5219, neither can it reasonably be construed as negating the implication of congressional consent to the taxation of shares in state banks established in *Lander*. The clear intent of section 5219 is to prohibit more favorable treatment of state banks than of national banks. *See Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 504, 48 S.Ct. 331, 333, 72 L.Ed. 673 (1928); *Merchants' Nat'l Bank v. City of Richmond*, 256 U.S. 635, 638—40, 41 S.Ct. 619, 620—621, 65 L.Ed. 1135 (1921); *Mercantile Nat'l Bank v. New York*, 121 U.S. 138, 78 S.Ct. 826, 30 L.Ed. 895 (1887). Consequently, state taxation of the state bank shares, as well as of national bank shares, falls within the original exception to the exemption provided by section 3701.

[13-16] The same conclusion follows without consideration of the express exception. In the absence of that exception, it might be contended that there is a conflict between the 1959 amendment and the provisions of section 5219 consenting to state taxation of bank shares. Such an apparent conflict, however, would not render section 5219 ineffective because of the well-known principle that repeals by implication are not favored. This principle applies to federal statutes as well as state statutes, so that when acts of Congress are in apparent conflict, it is duty of the courts to regard each as effective in the absence of a clearly expressed congressional intent to the contrary. *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133—34, 95 S.Ct. 335, 353—354, 42 L.Ed.2d 320 (1974); *Morton v. Mancari*, 417 U.S. 535, 548, 94 S.Ct. 2474, 2481, 41 L.Ed.2d 290 (1974. On this principle both section 5219 and the 1959 amendment can be given effect by construing section 5219 as a specific statue with respect to state taxation of bank shares and, therefore, as prevailing as against the more general exemption of federal securities provided by section 3701. This construction is in accordance with the rule that a more specific statute will given precedence over a more general one, regardless of their temporal sequence. *Busic v. United States*, 446, U.S. 398, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980); *Morton v. Mancari, supra; Bulova Watch Co. v. United States*, 365, U.S. 753, 758, 81 S.Ct. 864, 867, 6 L.Ed.2d 72 (1961). The effect of regarding the more specific statute as controlling is to interpret the provisions of the specific statute as an exception to the general statute. *Sam Bassett Lumber C. v. City of Houston*, 145 Tex. 492, 198 S.W.2d 879, 881 (1947); *Sheffield v. State*, 165 Tex.Cr.R. 354, 307 S.W.2d 100, 104 (1957); *Hallum v. Texas Liquor Control Board*, 166 S.W.2d 175, 177 (Tex.Civ.App.—Dallas 1942, writ ref'd).

The theory underlying this rule is explained in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-56, 96 S.Ct. 1989, 1993-1994, 48 L.Ed.2d 540 (1976), which involved a question similar to that now before us. A national bank was

sued for violation of the Securities Exchange Act, which provided that suit may be brought in any district where the violation occurred. The bank contended that venue of the suit was govverned by a provision of the earlier National Bank Act, which provided that suit against a national bank "may be brought in the district in which such association may be established." The Supreme Court agreed that the earlier statute was controlling and that its more specific venue provision applying to national banks was not repealed by implication. The opinion of Justice Stewart states principles directly applicable to the present case:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). 426 U.S. at 153, 96 S.Ct. at 1992.

The Court went on to say that when Congress enacted the National Bank Act, it was focusing on the particular problems of suits against banks, but that when it enacted the general provisions of the Securities Exchange Act, seventy years later, its focus was on the "broad universe of potential defendants subject to that Act." Consequently, under the principle of statutory construction previously

stated, the Court held that in the absence of a "clear intention otherwise," the specific venue provision of the earlier National Bank Act controlled. *Id.* at 154, 96 S.Ct. at 1993.

[17] By similar reasoning in the present case, it is apparent that when Congress enacted section 5219, it was focusing on the particular question of the taxation of bank shares, but when it amended section 3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest, from state and local taxation. Since there is no clear intention manifested by the amendment to extend the exemption to bank shares to the extent of the bank's holdings of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by section 5219.

This conclusion is confirmed by the legislative history of the 1959 amendment, which, though not the controlling evidence of legislative intent, indicates that the purpose of the Congress was to clarify and codify existing interpretations of the exemption rather than to abolish the distinction between a tax on bank shares and a tax on securities held by the bank. The Supreme Court has frequently resorted to committee reports and other legislative history to determine the purpose of statutes which, on their face, appeared no more doubtful than the statute now before us. *See, e. g., United Steelworkers v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979); *Muniz v. Hoffman*, 422 U.S. 454, 469, 95 S.Ct. 2178, 2186, 45 L.Ed.2d 319 (1975); *United Housing Foundation v. Forman*, 421 U.S. 837, 849, 95 S.Ct. 2051, 2059, 44 L.Ed.2d 621 (1975); *Philbrook v. Glodgett*, 421 U.S. 707, 714, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940).

The legislative history of the 1959 amendment to article 3701 strongly indicates that Congress had no intention to withdraw the consent to state taxation of bank shares provided by section 5219. The amendment was included as

section 105 in a bill designated as H.R. 9035, 86th Cong., 1st Sess. (1959), which raised the ceiling on the interest rates on series E and H United States Savings Bonds and made changes in other aspects of debt management. The House Committee on Ways and Means and the Senate Committee on Finance made identical reports to their respective houses concerning H.R. 9035. H.R.Rep.No.1148, 86th Cong., 1st Sess. (1959), S.Rep.No.909, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S.Code Cong. & Ad.News 2769. In these reports the "Summary of Bill" contains the following statement:

> Fourth, the bill makes it clear that both the principal and interest on U. S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes. *Id.*

No further reference to section 105 appears in the summary. The "General Statement" included in both of these reports contains the following:

> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. *The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear* that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, *or the interest on it,* or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. [Emphasis added.] *Id.* at 2773.

[18] It is noteworthy that the committee reports do not refer to the line of cases beginning with *Van Allen*, although they do refer to decisions holding interest on federal securities to be exempt and state that this interpretation is made explicit by the amendment. It seems highly unlikely that the reporting committees or either house of the Congress intended, by accepting these reports and enacting the proposed legislation, to abolish a distinction which had been well established by Supreme Court decisions and which had been characterized by the Supreme Court as one so "inextricably mixed with all taxing systems" that it "cannot be disregarded without bringing them into confusion which would be little short of chaos." *Home Savings Bank v. Des Moines*, 205 U.S. 503, 518, 27 S.Ct. 571, 575, 51 L.Ed. 901 (1907). This legislative history, therefore, confirms our conclusion that the purpose of Congress was to preserve, rather than expand, what the Supreme Court had construed to be the constitutional principle embodied in section 3701. See *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 147, 75 S.Ct. 607, 609, 99 L.Ed. 950 (1955). Consequently, we hold that the county's tax plan is not illegal because of its failure to deduct the federal securities held by the bank from its net assets in determining the value of its shares.

Discrimination Against Federal Securities

The bank and its shareholders also attack the validity of the county's method of assessing the bank's shares for taxation on the ground that it discriminates against United States obligations as an investment for banks. In an argument supporting this contention, *amici curiae* appearing on behalf of various banking associations assert that this discrimination consists of deducting the assessed value of the bank's real estate in computing the value of the shares without a similar deduction of obligations of the federal government held by the bank. They insist that the tax on bank shares imposed by article 7166 is unconstitutional because it is levied on the difference between the actual

cash values of each share and the proportionate amount per share at which the bank's real estate is assessed for taxation. This discrimination, they argue, makes real estate a more attractive investment for the bank than federal securities and, therefore, is an unlawful interference with the federal government's power to borrow money, citing *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 56 S.Ct. 31, 80 L.Ed. 91 (1935).

[19] We do not agree that the tax is an unlawful discrimination against federal securities. Article 7166 does not exempt the bank's real estate from taxation, but rather requires the bank to render it for taxation separately. In *Schuylkill*, by contrast, the trust company paid no tax on certain securities which were deducted from its assets in computing the tax on its shares because those securities were exempt from taxation. *Schuylkill* holds that to deduct other exempt securities from the bank's assets without deducting also federal securities in computing a tax on the company's shares unlawfully discriminates against federal securities.[6] No such discrimination is shown in this case.

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[6]The *Schuylkill* opinion shows that some of the securities exempted by the Pennsylvania statute were shares in corporations which had paid a tax on their capital analogous to the Texas franchise tax. The Court evidently treated these shares like other exempt shares because the corporations holding them paid no tax. This interpretation of the *Schuylkill* opinion is confirmed by the opinion on the subsequent appeal of that case, *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 [58 S.Ct. 295, 297, 82 L.Ed. 392] (1938). Mr. Justice Roberts, again speaking for the Court, explained his opinion on the earlier appeal as holding "that the exclusion from the base of a proportion of the *tax-exempt* shares of Pennsylvania corporations and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter." (Emphasis added.) This treatment of both classes of shares as exempt from tax, so far as the share-holding corporation is concerned, is consistent with the distinction in *Van Allen*, between a tax on a corporation and a tax on its shareholders, which the first *Schuylkill* opinion expressly recognized and reaffirmed.

Judgment

For the reasons stated, our former opinion is withdrawn, the appellees' motion for rehearing is granted, and appellants' motion for rehearing is overruled. Accordingly, the judgment of the trial court is affirmed.

AKIN and ROBERTSON, JJ., concur and join in this opinion.

ROBERTSON, Justice, concurring.

On submission of this case and in the original briefs filed by appellees, section 5219 of the Revised Statutes of the United States was not called to our attention and argued as authorizing taxation such as that here involved. Consequently, that statute was not considered by this court in its original deliberations or opinion. In their motion for rehearing appellees now, for the first time, raise the consent statute in support of the interpretation they argued for in their original briefs. This argument places the case in a posture entirely distinct from the position in which it was originally presented to this court.

In our original opinion we relied heavily on *Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (Mont.1978). Apparently, the argument now urged by appellees was not presented to that court either, although it did cite section 5219 (12 U.S.C. § 548) for another proposition. This being so, we must assume that the argument now advanced by appellees was not called to the attention of the Montana court in the form in which it is here argued and thus the argument with which we are presented was not considered by that court.

In any case, it is the function of this court, as a representative of the people it serves, to strive for a just resolution of disputes under the law. In this case, we are compelled, both legally and morally, to apply the law as enacted by the Congress and as interpreted by our Supreme

Court. Anything less would be a breach of that sacred trust invested in us by those we represent.

In view of the foregoing, I concur in the opinion of the Chief Justice affirming the judgment of the lower court.

ON APPELLANTS' MOTION FOR REHEARING

GUITTARD, Chief Justice.

The principal point made in the motion for rehearing is that since the express consent to state taxation of bank shares formerly contained in section 5219 of the Revised Statutes, 12 U.S.C. § 548 (1964), was deleted by the sweeping revision of that section in 1969, there is no longer any congressional consent to taxation of bank shares which can be recognized as an exception to the exemption of federal securities in section 3701 of the Revised Statutes, 31 U.S.C. § 742 (1976). The 1969 revision deletes provisions specifically authorizing certain taxes on national banks and their shareholders and provides simply that a national bank shall be treated as a bank organized under the law of the state where its principal office is located. 12 U.S.C. § 548 (1976).

[20] This argument may be plausible if only the current language of sections 5219 and 3701 is considered apart from the history of these two statutes. Nevertheless, since the revision of section 5219 does not expressly mention taxation of federal securities, the problem is one of construction, and we cannot properly determine the intent of these sections without reference to that history. Since we have concluded, for the reasons stated in our prior opinion, that the 1959 amendment to section 3701 was not intended to extend the tax exemption of federal securities to shares in banks holding federal securities, the question then becomes whether the 1969 revision of section 5219 was intended to have that effect. In considering this question, we are mindful of the rule that tax exemptions are strictly construed against the party asserting the exemption. *Conference of Major Reli-*

gious Superiors of Women, Inc. v. District of Columbia, 348 F.2d 783, 785 (D.C.Cir.1965); *Lutkins v. United States*, 312 F.2d 803, 805, 160 Ct.Cl. 648 (1963).

Our study of the 1969 revision of section 5219 and its legislative history gives no support to the contention that it was intended to extend the exemption so as to restrict the taxation of bank shares. That revision was made by Public Law 91—156. Act of Dec. 24, 1969, Pub.L.No.91—156, §§ 1(a), 2(a), 83 Stat. 434. We have examined the proceedings in Congress at the time Pubic Law 91—156 was under consideration. Cong.Rec. 35399 (November 21, 1969), 38634 (December 12, 1969); 1969 U.S. Code Cong. & Ad. News 1597. Public Law 91—156 delayed final application of the revised section 5219 for two years and provided for that period a temporary amendment by the terms of which the states' authority to tax national banks was broadened to include sales taxes and documentary-stamp taxes, but continued the authority to levy the taxes previously authorized, including bank-share taxes. Public Law 91—156 also directs the board of governors of the Federal Reserve System to make a study of the probable impact on the banking system and other economic effects of the permanent revision. Pursuant to these directions, the board prepared an extensive report to the Committee on Eanking, Housing and Urban Affairs of the United States Senate, entitled STATE AND LOCAL TAXATION OF BANKS. Board of Governors of Federal Reserve System, 92d Cong., 2d Sess., REPORT ON STATE AND LOCAL TAXATION OF BANKS (Comm. Print 1972) (hereinafter cited as STATE AND LOCATION TAXATIOIN OF BANKS). This report reviews the various amendments to section 5219 and confirms the impression stated in our prior opinion that the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 9, 24.

According to this report, the intent of Public Law 91—156 to broaden rather than restrict state authority is shown by

the fact that its enactment was precipitated by two restrictive decisions of the Supreme Court, *First Agricultural Nat'l Bank v. State Tax Commission*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), and *Dickinson v. First Nat'l Bank*, 393 U.S. 409, 89 S.Ct. 685, 21 L.Ed.2d 634 (1969), which invalidated state sales and use taxes and state documentary-stamp taxes with respect to national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 336. Both the temporary amendment and the permanent revision of section 5219 authorized such taxes. The purpose of the temporary amendment was not to permit the states to find additional sources of revenue in lieu of taxes that would no longer be available, as suggested in the motion for rehearing. Its purposes, rather, were (1) to require the states to enact affirmative legislation if they desired to extend their general taxing statutes to national banks that had previously been exempt from such taxation because of the restrictions in section 5219, (2) to give the states an opportunity to amend statutes that had previously been tied textually to specific authorizations in section 5219, and (3) to continue the prohibition of state and local taxes on intangible property of national banks until the probable impact of such taxes could be studied by the board of governors of the Federal Reserve System. *Id.* at 312—18.

Reviewing the history of bank share taxes, the report recognizes the *Van Allen* rule that such taxes are levied on shareholders rather than on the banks, *id.* at 44, 231—234, 382—395, and also recognizes that in view of large holdings of federal securities by national banks allowance of deductions for federal securities held by the banks would have the effect of nullifying all share taxes. *Id.* at 233. The report mentions the 1959 amendment to section 3701, 31 U.S.C. § 742 (1976), and proposes modification of the exemption of interest on federal securities. The discussion assumes that the existing exemption of such securities from property taxation would continue. *Id.* at 66, 67. The report gives no indication that either the 1959 amendment to section 3701 or the 1969 revision of section 5219 had any effect, separately or

together, on the taxation of bank shares as previously recognized under the *Van Allen* rule.

In Public Law 91—156, Congress recognized the legality of bank shares taxes by continuing the authority of the states to impose these taxes in the temporary amendments, which retains the existing provisions authorizing states to impose certain taxes on national banks, including bank share taxes, and adds authority to impose certain specified additional taxes before the permanent revision takes effect. This continuation would have been pointless if the effectiveness of bank share taxes had been nullified by the 1959 amendment to section 3701. 31 U.S.C. § 742 (1976). That it was not pointless is demonstrated by statistical tables in the report, which show that in 1969—70 bank share taxes were in force in twenty-seven states and formed a substantial portion of the taxes paid by national and state banks at that time. *Id.* at 17, 386—88. Thus, it appears that abrogation of the *Van Allen* rule in 1969 would have had a substantial impact, which is not mentioned in the report.

It is most unlikely that this impact would have been overlooked if the 1969 revision had had the effect of withdrawing previous congressional consent to state taxation of the full shareholder interest in national bank shares as previously provided in section 5219, because Congress in 1969, as well as in earlier years, was sensitive to both the interests of the banking industry and the revenue needs of the state and local governments, as both the text of Public Law 91—156 and the report of the board of governors demonstrate. There is no evidence, however, in any legislative history that Congress considered either in 1959 or 1969 the economic impact of abrogation of the *Van Allen* rule, which the supreme court had previously recognized as one that could not be disregarded without bringing state and local taxing system into confusion little short of chaos. *Home Savings Bank v. Des Moines*, 205 U.S. 503, 518, 27 S.Ct. 571, 575, 51 L.Ed. 901 (1907).

In the present case, the banks and their shareholders recognize in their motion for rehearing that the *Van Allen* rule originally rested on two grounds, (1) the distinction between taxation of shares and taxation of bank assets, and (2) congressional consent to state taxation of bank shares, as expressed in section 5219. Each of these grounds was sufficient in itself to uphold the validity of bank share taxes without any deduction for federal securities held by the banks. Neither the 1959 amendment to section 3701 nor the 1969 revision to section 5219 expressly abolishes this rule. The 1959 amendment does not affect the consent ground. Neither does the 1969 revision of section 5219 abrogate the *Van Allen* rule because its sweeping language clearly broadens rather than restricts the states' authority to levy taxes by giving them authority to treat national banks the same as state banks. If national banks must be treated the same as state banks, then shareholders in national banks must be treated the same as shareholders in state banks. Since the power of the states to tax the shares of state banks does not depend on congressional consent, except to the extent that federal securities may be involved, the *Van Allen* rule, previously applicable to state banks and their shareholders under the *Lander* decision, was continued by the 1969 revision with respect to national banks and their shareholders, whatever its original basis may have been. To hold that Congress intended by the 1969 revision to withdraw its consent to state taxation of bank shares to the extent of federal securities held by the banks is neither required by the language of Public Law 91—156, nor by any reasonable interpretation of that law in the light of its legislative history. Such a holding would be contrary to the principle above stated that tax exemptions are strictly construed against the party asserting the exemption. Consequently, we adhere to our opinion that the county properly assessed the tax on the shares of stock in question without any allowance or deduction for federal securities held by the bank.

Appellants' motion for rehearing is overruled.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 20659

From A District Court of Dallas County, Texas

WYNNEWOOD BANK AND TRUST, et al,
Appellants,

VS.

JOHN CHILDS, et al,
Appellees.

BEFORE CHIEF JUSTICE GUITTARD AND
JUSTICES AKIN AND ROBERTSON
OPINION BY CHIEF JUSTICE GUITTARD
JANUARY 23, 1981

ON MOTION FOR REHEARING

For the reasons stated in our opinion of this date in No. 20660, Bank of Texas, et al v. John Childs, et al, S.W.2d

(Tex. Civ. App. — Dallas 1981), our former opinion is withdrawn, appellees' motion for rehearing is granted, appellants' motion for rehearing is overruled, and the judgment of the district court is affirmed.

CLARENCE A. GUITTARD

Clarence A. Guittard
Chief Justice

D.N.P.

Justices Akin and Robertson concur.

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 20915

From A District Court of Dallas County, Texas

AMERICAN BANK AND TRUST, et al,

Appellants,

VS.

DALLAS COUNTY, et al,

Appellees.

BEFORE CHIEF JUSTICES GUITTARD AND
JUSTICES AKIN AND ROBERTSON
OPINION BY CHIEF JUSTICE GUITTARD
JUNE 3, 1981

After examining the briefs and hearing oral argument in this case and reviewing the authorities cited, we have determined that all matters raised by appellants were fully considered in Bank of Texas v. Dallas County, S.W.2d (Tex. Civ. App. — Dallas, No. 20660, January 23, 1981, motion for rehearing overruled, April 30, 1981). For the reasons stated in our opinions in that case, the judgment of the trial court in the present case is affirmed.

CLARENCE A. GUITTARD

Clarence A. Guittard
Chief Justice

D.N.P.

Art. 7166.

[7522] [5080]

Assessment of real estate by banks

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by h'm. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. Acts 1885 p. 106; G.L. vol. 9 p. 726.

ARTICLE 342-501. DOMICILE-FURNITURE AND FIXTURES-DEPRECIATION-EXCEPTION

No state bank shall, without prior written consent of the Commissioner, invest an amount in excess of fifty per cent (50%) of its capital and certified surplus in a domicile (including land and building) nor an amount in excess of fifteen per cent (15%) of its capital and certified surplus in its furniture and fixtures. Such domicile shall be depreciated each year not less than two and one-half per cent (2½%) of its cost to the bank until such domicile is charged down to twenty-five per cent (25%) of its cost, and the furniture and fixtures shall be depreciated each year not less than ten per cent (10%) of their cost to the bank until said account is charged down to One Dollar ($1), provided that the Commissioner may permit a lesser percentage to be charged off during any year.

Acts 1943, 48th Leg., p. 148, ch. 97, subch. V, art. 1.

ART. 342-501A. PARKING AREAS-CUSTOMERS AND EMPLOYEES

A bank may own or lease land in the vicinity of such bank as an automobile parking area exclusively or predominantly for the use of its customers and employees, provided that such land shall not be used for any other purpose. Such real estate shall become a part of the bank's domicile and shall be subject to the provisions of Article 1, Chapter V, Title 16 of The Texas Banking Code of 1943.

Acts 1957, 55th Leg., p. 370, ch. 175, § 1.

ART. 342-502. OTHER REAL ESTATE-DEPRECIATION-EXCEPTIONS

No State bank shall acquire real estate, other than its domicile, except in satisfaction or partial satisfaction of indebtedness, or in the ordinary course of the collection of loans and other obligations owing the bank, or for the use of the bank in future expansion of its banking house. No

State bank shall assign an original book value to such real estate in excess of its reasonable value at the time of acquisition, and such real estate shall be depreciated each year ten per cent (10%) of such original book value until charged down to twenty-five per cent (25%) of its original book value; provided that the Commissioner may permit a lesser percentage to be depreciated during any year. If such real estate is acquired for the use of the bank in future expansion of its banking house, such real estate shall be depreciated each year ten per cent (10%) of its original book value until such time as it is actually improved and occupied as a banking house, after which it shall be depreciated in accordance with the provisions of Article 1 of this Chapter.[1] The original book value of such real estate shall be included in determining whether the State bank has invested an amount in excess of fifty per cent (50%) of its capital and certified surplus in a domicile (including land and building) under the provisions of Article 1 of this Chapter. If such real estate acquired for the use of the bank in future expansion of its banking house is not improved and occupied as a banking house within three (3) years from the date of its acquisition, the bank shall sell or otherwise dispose of such property; provided that the Commissioner may for good cause shown grant an extension of time for a period of one year or more.

Acts 1943, 48th Leg., p. 148, ch. 97, subch. V, art. 2. Amended by Acts 1959, 56th Leg., p. 894, ch. 412, § 8, eff. May 30, 1959.

§ 29. POWER TO HOLD REAL PROPERTY

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

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[1]Article 342-501.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estatae purchased to secure any debts due to it, for a longer period than five years. R.S. § 5137; Feb. 25, 1927, c. 191, § 3, 44 Stat. 1227.

§ 29. POWER TO HOLD REAL PROPERTY

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

[*See main volume for text of First to Fourth designated pairs.*]

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period, or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real estate, and subject to such conditions and

limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.

Notwithstanding any other provision of this section, any national banking association which, on July 27, 1981, held title to and possession of real estate which was carried on the association's books at a nominal value on December 31, 1979, may continue to hold such real estate until December 31, 1982, if the earnings from such real estate are separately disclosed in the financial statements of the association.

As amended Mar. 31, 1980, Pub.L. 96-221, Title VII, § 701(a), 94 Stat. 186; July 27, 1981 Pub.L. 97-25, Title III, § 302, 95 Stat. 145.

Opposition

2

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1717

In The

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

vs.

DALLAS COUNTY, ET AL.,
Respondents.

On Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF IN OPPOSITION FOR RESPONDENTS THE CITY OF DALLAS, MAX NOLLER, DALLAS INDEPENDENT SCHOOL DISTRICT, AND THE BOARD OF EQUALIZATION OF THE CITY OF DALLAS AND DALLAS INDEPENDENT SCHOOL DISTRICT

Attorneys for Respondents The City of Dallas, Max Noller, Dallas Independent School District, and the Board of Equalization for the City of Dallas and Dallas Independent School District.

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April, 1982

QUESTIONS PRESENTED

1. Whether a state property tax on bank shares computed on a bank's net assets less a proportionate amount of real estate, without any deduction for tax-exempt United States obligations owned by the bank violates 31 U.S.C. § 742?

2. Whether a state tax on bank shares computed on a bank's net assets with a deduction for the bank's real estate, but without any deduction for its tax-exempt United States obligations, discriminates against those obligations in violation of the Borrowing Clause of the Constitution?

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No. 81-1717

In The

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OCTOBER TERM, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

vs.

DALLAS COUNTY, ET AL.,
Respondents.

On Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

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BRIEF IN OPPOSITION FOR RESPONDENTS THE CITY OF DALLAS, MAX NOLLER, DALLAS INDEPENDENT SCHOOL DISTRICT, AND THE BOARD OF EQUALIZATION OF THE CITY OF DALLAS AND DALLAS INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Appendix p. 44a. of the Petition. This first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at Appendix p. 4a. The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at Appendix p. 28a.

The summary opinion of the court below in Cause No. 20915, relying exclusively on the opinion in Cause No. 20660, was not reported and is reproduced at Appendix p. 1a. Respondents the City of Dallas and Dallas Independent School District were parties in Cause No. 20915 and Amici Curia in Cause No. 20660.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS

31 U.S.C. § 742 prior to its amendment in 1959

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

31 U.S.C. § 742 after its amendment in 1959

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

12 U.S.C. § 548 prior to its amendment in 1969

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) acccording to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax impoeed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its

limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own law or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof,

to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.

12 U.S.C. § 548 after its Amendment in 1969

For the purpose of any tax law enacted under authority of the United States or any States and any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960)

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be in a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon

its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

Banking corporations in the State of Texas are taxed according to Tex.Rev.Civ.Stat.Ann. art. 7166 (Vernon 1960). The bank itself is taxed only upon its real property, while its shareholder's are taxed upon the value of their shares. Real property taxed to the bank is deducted proportionately from the value of the shareholder's shares.

The share tax in Cause No. 20915 was assessed upon the equity capital as designated on each bank's statement of condition for December 31, 1979.

Petitioners sued for injunctive and declaratory relief on the grounds that this method of taxation violates federal law by including federal obligations in the computation of the tax. The Courts below found that there was no violation of federal law and Petitioners now seek a writ of certiorari from this Court to review those judgments.

SUMMARY OF THE ARGUMENT

Respondents contend that the decisions of this Court have consistently interpreted the statutes of the United States to consent to the taxation of the *whole interest* of the shareholders of a bank, even though some assets owned by the bank are United States obligations.

REASONS FOR DENYING THE WRIT

A writ of certiorari should be denied because there are no important questions of federal law that have not already been determined by this Court, and because the decision below is clearly correct.

The Questions Of Federal Law Have Already Been Decided By This Court.

Section 5219 of the Revised Statutes of the United States[1] and its successors, permit the local taxation of national bank shares. It has been construed to authorize the inclusion of United States obligations in the computation of a local share tax since 1866 when *Van Allen v. Assessors*, 70 U.S. (3 Wall.) 573 was decided. Each Supreme Court case decided on the same facts which are now before this Court, has applied the *Van Allen* rule to the taxation of bank stock.

The present language in both 31 U.S.C. § 742 and 12 U.S.CC. § 548 has not changed the application of the *Van Allen* rule to the taxation of bank stock.

In 1902, the opinion in *Cleveland Trust Company v. Lander*, 184 U.S. 111 (1902) reviewed the effect of R.S. § 3701[2], the predecessor of 31 U.S.C. § 742, and determined that the share tax would still authorize the inclusion of federal obligations owned by the bank. The *Lander* Court found that the share tax did not conflict with the exemption of federal obligations.

The 1959 amendment to the exemption statute does not preclude the same construction, because the Court has always interpreted this statute to apply to a tax which

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[1]This provision was originally enacted as part of the National Bank Act of June 3, 1864, Ch. 106, § 41, 13 Stat. 99, 111-112 and later codified as Section 5219 of the Revised Statutes of the United States and embodied in 12 U.S.C. § 548 in 1964.

[2]Originally enacted by Act of February 25, 1862, Ch. 33, § 2, 12 Stat. 346 and later amended by Pub. L.No. 86-346, § 105(a), 73 Stat. 622 (1959) and embodied in 31 U.S.C. § 742.

considers federal obligations as well as a tax *upon* those obligations.

The effect of a bank share tax which *considers* federal obligations in its computation has been recognized by this Court in decisions prior to the 1959 Amendment of 31 U.S.C. § 742. In 1955, *Society for Savings v. Bowers*, 349 U.S. 143 acknowledged the general rule permitting the taxation of bank shares without the exclusion of federal obligations owned by the bank.

It is evident from the *Bowers* opinion, that this Court had always interpreted the *Van Allen* rule to apply to a tax which included federal obligations in its computation, just as it is applied to a tax *upon* federal obligations. *Bowers, supra*, at p. 147, found that in regard to the taxation of bank stock, the inclusion of federal obligations in the computation was permissible. Justice Harlan, while explaining the rule of immunity of federal obligations from state taxation wrote, "The rule has been carried forward to embrace indirect taxation of such obligations through their inclusion in a tax imposed on all the property of a taxpayer."

This is substantially the same language adopted by Congress in the 1959 amendment of 31 U.S.C. § 742. It is clear that in the opinion of the Court the 31 U.S.C. § 742 exemption applied to a tax which *considered* United States obligations indirectly in the computation of the tax, even before the 1959 amendment of § 742, yet in regard to a bank-share tax, the inclusion of those obligations was allowed.

Likewise, the present language of 12 U.S.C. § 548 has in no way limited or restricted the taxation of banks by the states. The 1969 amendment to 12 U.S.C. § 548 has not withdrawn Congressional consent from the share tax, but merely has afforded states additional methods for the taxa-

tion of national banks, without withdrawing authorization from those methods already in use[3].

This Court has consistently upheld the type of taxation of bank shares attacked by Petitioners. The decisions of this Court indicate that the various amendments to 31 U.S.C. § 742 and 12 U.S.C. § 548 have not changed its position concerning the validity of this type of tax, therefore, the questions of federal law outlined by Petitioners do not need to be settled again by this Court. The courts below have decided these questions consistently with the decisions of this Court.

The Decision Below is Correct.

The decisions on Motions for Rehearing by the Court of Appeals Fifth Supreme Judicial District, have correctly construed the federal law in regard to the taxation of bank shares by the City of Dallas and Dallas Independent School District. The Court below analyzed the *Van Allen* case, finding, as this Court did in *Van Allen*, *supra*, that Congressional consent to the taxation of *all* the shares of bank stock allows the inclusion of federal obligations. A review of the subsequent case law indicates that this Court has continued to uphold the consent concept each time it construed a bank share tax in connection with the federal obligation exemption. In *Mercantile National Bank v. Mayor of New York*, 121 U.S. 138 (1887), the Court, while citing the *Van Allen* decision, found the states "under the permission of Congress" could tax shares of national bank stocks "notwithstanding the capital of the bank was invested in bonds of the United States which were not

[3]See S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. and Act News 1594.

subject to taxation". *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923) again recognizes the consent concept in regard to the taxation of the "whole of the interest of the shareholder". *Cleveland Trust Company v. Lander, supra*, citing R. S. § 5219 also found that this statute authorized the taxation of bank shares without excluding exempt federal obligations. Justice Harlan in *Society for Savings v. Bowers, supra*, at p. 174, citing *Van Allen* said, "There, Congressional consent to state taxation of the stock of national banks upon certain conditions, was held, over strong dissent, to permit such taxes to be assessed without the exclusion of federal obligations owed by the banks." These cases clearly demonstrate that the "consent" concept is well-founded in the judicial interpretations of 12 U.S.C. § 548 and its predecessors.

The *Bowers* decision recognized at p. 147 that, "this rationale has been carried over to cases involving the stock of state-created banks, and thus a tax on their shareholders, though measured by corporate assets was held not to offend the rule immunizing such obligations from state taxation."

Petitioners construe the 1969 amendment of 12 U.S.C. § 548 to erase all prior case law concerning the taxation of bank shares. Because this very issue has been decided on numerous occasions by the Court since the year 1866, Petitioners can hardly argue that a 1969 amendment, which merely broadens 12 U.S.C. § 548, can eliminate all the prior judicial constructions regarding this type of taxation.

Petitioners rely primarily on *Schuylkill Trust Co. v. Pensylvania*, 296 U.S. 113 (1935) to contend that United States obligations have been discriminated against, since real property is deducted in the bank share tax while federal

obligations are not. The *Schuylkill* case involved two types of federal obligations which were discriminated against, one was national bank stock owned by the trust company and the second was other federal obligations exempt under 31 U.S.C. § 742. The state statute allowed the deduction of state assets which previously had been taxed under a capital stock tax as well as state assets exempt under state law. The court found that this discriminated against national bank stock, because national bank stock was already taxed to the trust company as a bank shareholder under 12 U.S.C. § 548. Other federal obligations were discriminated against because they were not allowed a deduction, while state exempt obligations were allowed a deduction.

The *Schuylkill* holding is not applicable to the bank stock tax in Texas. In Texas, real property is taxed to the bank in a separate tax, just as national bank stock had already been taxed against the trust company separately, in *Schuylkill*. There is no evidence in the record to indicate that these banks owned any other type of federal securities which were previously taxed to the bank and therefore would have to be deducted in the same manner as real property to avoid double taxation.

There is no discrimination between exempt federal obligations and exempt state obligations in the method of taxation before this Court. The Texas statutes do not authorize deduction of exempt state obligations from the bank share tax. *Schuylkill* has no application to the taxation of bank shares in the State of Texas, because there is no discrimination in favor of state assets as opposed to federal obligations.

It is interesting to note that when the *Schuylkill* cause came before this Court again after the discrimination defects

had been cured, it allowed the taxation of bank shares without excluding federal obligations. *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506 (1938).

The courts below have correctly interpreted the applicable federal law and have correctly relied upon the judicial interpretations of that law made by this Court and therefore, their decisions should be upheld.

CONCLUSION

For the Foregoing Reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,
Appellants,

v.

DALLAS COUNTY, et al.,
Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
June 3, 1981

OPINION

After examining the briefs and hearing oral argument in this case and reviewing the authorities cited, we have determined that all matters raised by appellants were fully considered in Bank of Texas v. Dallas County, 615 S.W.2d 810 (Tex. Civ. App. — Dallas, No. 20660, January 23, 1981, motion for rehearing overruled, April 30, 1981). For the reasons stated in our opinions in that case, the judgment of the trial court in the present case is affirmed.

CLARENCE A. GUITTARD
Chief Justice

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20915

AMERICAN BANK AND TRUST, et al.,

Appellants,

v.

DALLAS COUNTY, et al.,

Appellees.

Wednesday, June 3, 1981

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees Dallas County, et al, have and recover of and from the appellants, American Bank and Trust, et al and from the check deposit in the hands of the District Clerk of Dallas County, Texas made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

January 6, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-589, AMERICAN BANK & TRUST ET AL, v. DALLAS COUNTY ET AL, was this day refused. No reversible error.

Chief Justice Greenhill not sitting.

Very truly yours,

GARSON R. JACKSON, Clerk

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20660

BANK OF TEXAS, et al.,

Appellants,

v.

JOHN CHILDS, et al.,

Appellees.

From a District Court
of Dallas County, Texas

Before Chief Justice Guittard
and Justices Akin and Robertson
Opinion by Chief Justice Guittard
Concurring Opinion by Justice Robertson
January 23, 1981

OPINION
ON MOTIONS FOR REHEARING

The principal question in this case is the validity of the tax on bank shares assessed by Dallas County under article 7150.6 and 7166 of the Texas Revised Civil Statutes.[1] The suit was brought by the Bank of Texas, a state banking corporation, and all its shareholders, against the county, its tax assessor-collector, and board of equalization, for mandamus, injunction, and declaratory relief, alleging that the county's tax plan of 1979 is illegal under state law, or if not illegal, unlawfully discriminates against holders of bank shares because no such tax is assessed against other intangible property including other moneyed capital in the hands of individuals. The bank and its shareholders further contend that the assessment is illegal under fed-

[1] These articles were repealed by Section 6(a)(1) of the Property Tax Code, effective January 1, 1982. TEX. LAWS 1979, ch. 841, at 2329.

eral law because it considers the value of obligations of the United States held by the bank in computing the tax, contrary to the federal statute exempting such obligations from taxation.

After a trial without a jury, the trial court upheld the tax and denied the relief sought. We affirm.

State Law

We consider first the contention that the county has no authority to tax shares of bank stock because article 7150.6, which exempts most intangible property from taxation, has the effect of repealing the tax on bank shares imposed by article 7166. Since article 7166 is not expressly repealed, we must examine the two statutes to determine whether the legislature intended to impliedly repeal the tax on bank shares. We conclude that no such repeal was intended by the legislature.

Article 7166 is as follows:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered

property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960).

The pertinent provisions of article 7150.6 are as follows:

(a) Except as provided by Subsection (b) of this article, intangible property is exempt from ad valorem taxation.

(b) Intangible property is taxable ad valorem if its taxation is provided for by Article 7105, 7165, 7166, or 7244, Revised Civil Statutes of Texas, 1925, as amended; by Section 11.09, Texas Savings and Loan Act (Article 852a, Vernon's Texas Civil Statutes) .... TEX. REV. CIV. STAT. ANN. art. 7150.6 (Vernon Supp. 1980).

The bank and its shareholders contend that since article 7166 provides that bank shares may not be taxed at a greater rate than other moneyed capital in the hands of individuals, and article 7150.6 expressly exempts such other moneyed capital from taxation, 7166 no longer imposes a tax on bank shares. They acknowledged in oral argument that this contention means that article 7166 has been repealed by implication.

We do not agree that article 7166 was repealed by article 7150.6. Since repeals by implication are not favored, old and new statutes that are not positively repugnant will each be construed so as to give effect to both, if possible. *Standard v. Sadler,* 383 S.W.2d 391, 395 (Tex. 1964). We have no difficulty in construing these two statutes so as to give effect to both. In fact, article 7166 falls within an express exception to the exemption of intangible property from taxation provided by article 7150.6(a). It would be clearly contrary to the legislative intent to hold that an earlier statute expressly specified in an exception to the later statute is repealed by the later statute.

The only provision of article 7166 that is arguably repealed by article 7150.6 is the last sentence of article 7166, which provides:

> Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against all other moneyed capital in the hands of individuals.

If the intent of article 7150.6 is to repeal all taxes on "other moneyed capital in the hands of individuals" but to retain the tax on bank shares, as the reference to article 7166 in subsection (b) of article 7150.6 indicates, then the last sentence of article 7166 above quoted may no longer be effective. This interpretation is preferable to ascribing to the legislature the intent to repeal article 7166 in its entirety because of the express exclusion of the bank shares tax in article 7150.6(b). Moreover, repeal of only the last sentence would be supported by the rule that when two statutes have conflicting provisions, the earlier statute will be held to be repealed only to the extent of the conflict, and otherwise will be construed as remaining in effect. *Whittenberg v. Craven,* 258 S.W. 152, 153 (Tex. Com. App.

1924, judgmt adopted); *Texas State Board of Pharmacy v. Kittman*, 550 S.W.2d 104, 107 (Tex. Civ. App. — Tyler 1977, no writ); *Parker v. State*, 208 S.W.2d 380, 383-84 (Tex. Civ. App.), *aff'd* 147 Tex. 57, 212 S.W.2d 132 (1948). Consequently, rather than construe article 7150.6 as repealing article 7166 in its entirety, we would be required to construe it as repealing only the last sentence.[2]

However, it may not be necessary to go so far as to hold that the last sentence of article 7166 has been repealed by article 7150.6. Subdivision (b) of article 7150.6 enumerates several statutes in addition to article 7166 that are excluded from the exemption of intangible property from taxation. We need not determine whether any of these other statutes impose a tax on "moneyed capital in the hands of individuals." There is no contention here that any of them does impose such a tax, but if any of them do, the last sentence of article 7166 may still be effective to forbid the taxation of bank shares at a greater rate than the tax imposed by any of those statutes. If none of them imposes such a tax, then the last sentence may have no effect until and unless legislation is enacted imposing such a tax.

Furthermore, we note that there is no evidence in the present record that there is, in Dallas County or elsewhere,

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[2]That construction would be reasonable in view of the fact that the provision forbidding taxing bank stock at a greater rate than "other moneyed capital in the hands of individuals," was apparently taken from section 5219 of the Revised Statutes of the United States, which authorized state taxation of shares of national banks, but not at a greater rate than "other moneyed capital in the hands of individual citizens of such State." Since the federal statute has now been amended to provide that a national bank shall be treated the same as a state bank for purposes of state taxation, 12 U.S.C. § 548 (1976), it is reasonable to suppose that the corresponding limitation in article 7166 is no longer necessary.

any "other moneyed capital in the hands of individuals" that is exempt from taxation under article 7150.6. Consequently, there is no evidence the tax plan of Dallas County is illegal on the ground that the bank shares in question are taxed at a greater rate than "other moneyed capital in the hands of individuals."

For the reasons stated, we hold that when article 7150.6 and article 7166 are read together, and effect is given to both to the extent possible, a tax is still imposed on bank shares. Our holding in this respect is not contrary to *Childs v. Reunion Bank*, 587 S.W.2d 466, 470 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). That case concerned taxes assessed before the exemption provided by article 7150.6 became effective, and this court held that since the record showed that numerous classes of taxable property, including other moneyed capital in the hands of individuals, were subject to taxation, but were not included in the tax rolls, the assessment on bank shares was in violation of article 7166. That holding cannot control this case because of the provisions of article 7150.6, which, as already explained, by its express reference to article 7166, excludes bank shares from the exemption of intangible property, and, consequently, would have the effect of repealing only the last sentence of article 7166, if that sentence would otherwise extend the exemption to bank shares.

Inequality of Taxation

The bank and its stockholders contend further that if a tax is imposed on bank shares by articles 7150.6 and 7166, these statutes are unconstitutional because they deliberately omit taxation of shares of non-banking corporations and most intangible personal property, contrary to article VIII, section 1, of the Texas Constitution, which provides, "Taxation shall be equal and uniform." The county responds that under article VIII, section 1, as amended effective Janu-

ary 1, 1979, taxation of intangible property is permitted, but not required. We agree with the county's interpretation. Formerly, this section provided, "All property in this State . . . shall be taxed in proportion to its value . . . ." As amended, it provides, "All real property and tangible personal property in this State . . . shall be taxed in proportion to its value . . . ." The amendment adds further that the legislature "may provide for the taxation of intangible property." We interpret the amendment to mean that the legislature may tax intangible property or exempt it, or tax certain classes of intangible property and exempt others.

We recognize that section 1 as amended still provides, "Taxation shall be equal and uniform." With respect to intangible property, this requirement applies only to property which the legislature decides to tax, and permits reasonable classification for tax purposes, so long as the taxes are equal and uniform within each class. *See Hurt v. Cooper*, 130 Tex. 433, 110 S.W.2d 896, 900-01 (1937); *Grayson County State Bank v. Calvert*, 357 S.W.2d 160, 162 (Tex. Civ. App. — Austin 1962, writ ref'd n.r.e.).

The further contention is made, however, that articles 7150.6 and 7166 deny equal protection of the laws, and, therefore, also offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because no shares of other corporations are so taxed. This contention raises the question of reasonable classification. The authorities recognize that the states have a wide leeway in making classifications which, in their judgment, produce reasonable systems of taxation. *Kahn v. Shevin*, 416 U.S. 351, 355 (1974). Accordingly, a state tax law that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Id.* (tax exemption of widows not applying to widowers upheld).

We conclude that bank shares form a class of stock that, for tax purposes, may reasonably be distinguished from other intangible property, including other shares of stock. Banks enjoy powers and privileges not granted to other corporations. As the county points out, other corporations are subject to franchise taxes, which are not imposed on banks. Based on these differences, we cannot say that the legislature has singled out bank shares for arbitrary and unreasonable discrimination.

This conclusion is supported by *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181 (1933), in which it was contended that a tax on state banks denied equal protection because it was not also imposed on other corporations competing with banks. The court held:

> We cannot say that the state Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business, notwithstanding actual competition between them.
>
> Mere competition between them is not enough to show two concerns must be burdened alike. The state Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious, or wholly unreasonable. *Id.* at 185-86.

In the present case it is also suggested that no valid discrimination can rest on the difference between banks and other corporations without repudiating the distinction between a tax on bank assets and on bank shares. The county

relies on this distinction, established in *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866), to avoid application of the exemption of federal securities held by the bank in assessing the tax on the shares. The *Van Allen* rule will be discussed in the next section of this opinion. At this point we need observe only that we cannot accept the view that even though there may be valid grounds to distinguish between banks and other corporations, bank shareholders must be treated like all other shareholders for purposes of taxation. This is a question of equal protection rather than one of determining what property Congress has exempted from state taxation or has permitted the state to tax, such as that before the Supreme Court in *Van Allen.* If a state decides to give more favorable tax treatment to shareholders in corporations that pay franchise taxes than to shareholders in corporations that do not pay such taxes, such a classification cannot be regarded as arbitrary or unreasonable, and, therefore, the constitutional principle of equality is not offended. Consequently, we hold that the tax imposed on bank shares by articles 7150.6 and 7166 is valid and constitutional.

Exemption of Federal Securities

Another ground alleged as establishing invalidity of the county's plan for taxing bank shares is its failure to deduct the value of the federal securities held by the bank from the bank's net assets before apportioning their value pro rata in determining the value of the shares. Article 7166 provides that the real estate owned by the bank shall be separately rendered and assessed, and that all shares shall be rendered at their actual cash value, but that each share shall be assessed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed. No provision is made for a sim-

ilar deduction with respect to the federal securities held by the bank.

The evidence shows that the assessed value of the shares for 1979 was determined by book value rather than market value, that is, by subtracting the bank's liabilities from its total assets, deducting the assessed value of its real estate, and dividing that net figure by the number of shares to determine the taxable value per share. There is also evidence showing that if all obligations of the United States held by the bank were deducted from the value of the net assets, nothing would remain to be divided proportionately among the shareholders. The bank and its shareholders contend that this method of assessment is illegal under section 3701 of the Revised Statutes of the United States, 31 U.S.C. § 742 (1976), which provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The first sentence of this statute was enacted originally in 1862.[3] The second sentence was added by amendment in 1959.[4]

Before the amendment, state taxation of bank shares without allowing any deduction for federal securities was upheld by a well-established line of decisions by the Supreme Court of the United States, beginning with *Van*

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[3] Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 346.

[4] Pub. L. No. 86-346, § 105(a), 73 Stat. 622 (1959).

Allen v. The Assessors, 70 U.S. (3 Wall.) 573, 18 L.Ed. 229 (1866). The bank and its shareholders insist that the 1959 amendment to section 3701 changed the rule established by those decisions because the amendment extended the exemption to "every form of taxation that would require that either the obligations or the interest thereon, or both, be considered directly or indirectly in the computation of the tax," with exceptions not applicable to the present case. They rely on *Montana Bankers Ass'n v. Montana Department of Revenue, Mont.*, 580 P.2d 909 (1978), which held that the 1959 amendment is unambiguous and by its plain language precludes the assessment of a tax on bank shares that requires obligations of the United States to be considered directly or indirectly in the computation of the tax.

Although we originally reached the same conclusion as the Montana court, further examination of section 3701 in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, "Except as otherwise provided by law," and also ignores another statute, section 5219 of the Revised Statutes of the United States,[5] which falls within this exception. As we shall show

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[5]Section 5219 was originally included in the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, and was later codified as section 5219 of the revised statutes. It was also embodied in 12 U.S.C. § 548 (1964). It was amended in 1969 to provide simply that for the purpose of any federal or state tax law, a national bank "shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. § 548 (1976). We refer in this opinion to section 5219 as it existed in 1959, when section 3701 was amended, because our primary question turns on the meaning of section 3701. The 1969 amendment is evidently intended to broaden rather than restrict congressional consent to state taxation of national banks. *See* S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 1594.

in the discussion following, section 5219, upon which the *Van Allen* rule is based, expressly consents to local taxation of national banks, and, by implication, also consents to taxation of shares in state banks. It has been construed in *Van Allen* and the cases following it to extend this consent to the full interest of the shareholder in shares in both national and state banks, even though the tax is measured by the bank's capital without any deduction of federal securities held by the bank. When we read the exemption statute, section 3701 as amended in 1959, together with the consent statute, section 5219, it appears to us that Congress did not intend by the amendment to withdraw in any respect its consent to state taxation of national or state bank shares.

Consideration of this question must begin with the *Van Allen* opinion itself. The main question in that case was whether the state of New York had the power to tax the shares of national banks whose capital was wholly invested in obligations of the federal government. Counsel contended that the shares were exempt, citing the exemption statute (later codified as section 3701 of the Revised Statutes of the United States) and also the federal government's power to borrow money, as conferred by article I, section 8 of the Constitution of the United States. The opinion of the Supreme Court does not expressly refer to either the statute or to this provision of the Constitution, but evidently considered the question in the light of both. The Court does discuss at length and quotes from the consent statute a provision of the National Bank Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-112, which then provided that the shares of national banks should be subject to taxation by state authority, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and providing further that such a tax "shall not exceed the rate imposed

upon the shares of any of the banks organized under the authority of the State." 70 U.S. (3 Wall.) at 581, 18 L.Ed. at 233.

The Supreme Court first considered the question of whether the tax was invalid because no similar tax was levied on the shares of state banks. The Court pointed out that the New York statute levied a tax on the capital of state banks, but since their capital might also be invested in federal securities, which were exempt from taxation, such a tax was not equivalent to a tax on the stockholders, such as that assessed against the stockholders of national banks. Consequently, the tax was held to be invalid under that section of the consent statute providing that taxes imposed on national banks should not exceed the rate imposed on the shares in state banks.

The Court went on to say, however, that since this defect might be remedied by the state legislature, (presumably by imposing a similar tax on shares in state banks), it would consider the main question of the power of the state to authorize the taxation of the shares of national banks whose capital was wholly invested in obligations of the federal government. In deciding this question, the Court again relied on the provisions of the National Bank Act and its express consent to state taxation of such shares, and held that such a tax was valid on the ground that the Congress, in authorizing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation. This appears to be the primary ground of the opinion. As an additional ground, the Court held that the tax on the shares was not a tax on the capital of the bank because of the shareholders' separate ownership of the shares. In discussing this ground, the Court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares, saying that although Con-

gress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act.

The *Van Allen* opinion bears directly on the question of whether the consent statute permits the state's taxing power to apply only to that portion of the shareholder's interest in the bank's capital that was not invested in obligations of the federal government. After a detailed analysis of the National Bank Act, the Court concluded that Congress had intended to make the entire interest of the shareholders subject to taxation, and observed that such a limitation on the meaning of the term "shares" would be "so grave and important a change in the use of the term that, if so intended, would not have been left to judicial construction." 70 U.S. (3 Wall.) at 588, 18 L.Ed. at 236.

The *Van Allen* decision has been repeatedly reaffirmed and regarded as "settled law" by the Supreme Court. *See, e.g., People v. Commissioners of Taxes,* 71 U.S. (4 Wall.) 244 (1867); *Des Moines Nat'l Bank v. Fairweather,* 263 U.S. 103, 112-114 (1923); *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). In *Bowers* the Court characterized section 3701 as a legislative expression of the constitutional principle of the exemption of federal securities from state and local taxation, derived from the power of the federal government to borrow money conferred by article I, section 8, of the Constitution of the United States, and from the Supremacy Clause, article VI, clause 2.

The *Van Allen* rule was extended to shares in state banks in *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902). In that case a trust company organized under the laws of Ohio argued that the state tax on its shares should be computed by deducting from its capital certain federal securities because of the exemption provided by section 3701 of the

Revised Statutes of the United States. The Supreme Court observed that this argument claimed a greater immunity for the shares in the trust company than section 5219 provided for shares in national banks. In response to the argument that the laws of Congress governing taxation of national bank shares were immaterial to the power of the state to tax state bank shares, the Court held:

> The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219) by another (§ 3701), between which there is no want of harmony. *Id.* at 115.

As we understand the *Lander* opinion, it holds that section 5219, which by its terms consents to state taxation of national bank shares, also extends to state bank shares, and that any contrary interpretation of the exemption statute, section 3701, would bring it into conflict with section 5219. This conclusion logically follows from the *Van Allen* holding that the New York state tax on national bank shares was invalid because it imposed no equivalent tax on state bank shares. Of course, no federal consent was required for state taxation of the shares of state banks, as distinguished from national banks, except to the extent that state bank shares would otherwise have been exempt under section 3701 because of federal securities held by the bank. Consequently, the only pertinency of section 5219 to the *Lander* case was its effect on the exemption otherwise provided by section 3701. In other words, the Court held that in order to avoid more favorable treatment of state banks that national banks, the consent provided by section 5219 for state taxation of national bank shares, regardless of federal securities held by the bank, must apply also to state taxation of state bank shares.

These decisions demonstrate that before the 1959 amendment to section 3701, the state's authority to impose taxes on the shares of both state and national banks, valued according to the bank's assets without deducting federal securities, rested on the congressional consent provided by section 5219 as well as on the distinction between ownership of bank shares and bank assets. Therefore, we must take into consideration the language and purpose of both section 3701 and section 5219 in assessing the validity of the argument that the amendment to section 3701 changed the *Van Allen* rule. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). When the two statutes are read together, we find no irreconcilable conflict between the two. There can be no conflict in view of the initial words of section 3701, "Except as otherwise provided by law," which remained in the statute as before the amendment. This express exception obviates any difficulty that might otherwise exist in reconciling the provisions of section 5219 with the 1959 amendment to section 3701. The consent provided by section 5219 is "otherwise provided by law," and, therefore, falls within the exception to the exemption.

The original exception in section 3701 is not repealed or modified by the 1959 amendment, although other exceptions, not "otherwise provided by law," were added. One of these exceptions applies to corporate franchise taxes. Before the amendment, the exemption had been held not to apply to a tax imposed on a corporate franchise for the privilege of doing business in corporate form, though the tax was based on corporate assets (or income) without deducting federal securities (or the interest therefrom). *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931); *Home Ins. Co. v. New York*, 134 U.S. 594 (1890). There was some inconsistency in the decisions on this point, however. *See Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929); Comment, *Share Tax, Franchise Tax and Federal Banks* —

The Schuylkill Trust Co. Case, 84 Pa. L. Rev. 758, 764-66 (1936). The 1959 amendment to section 3701 cleared up this inconsistency by providing a specific exception for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations." It also provided a specific exception for estate and inheritance taxes, which, by similar reasoning, are imposed on the privilege of succession rather than on the property passing. *See West v. Oklahoma Tax Commission*, 334 U.S. 717, 727 (1948); *Billings v. Illinois*, 188 U.S. 97 (1903); *Cahn v. Calvert*, 159 Tex. 385, 321 S.W.2d 869, 872 (1959). In neither case, however, had such an exception been established on the basis of another federal statute, as in the case of bank shares, and consequently, such taxes were not clearly embraced within the express exception provided by the original exemption statute. There was no need to add another specific exception for taxes on bank shares because that subject was "otherwise provided by law," within the original exception, which is clearly broad enough to cover such taxes with respect to national bank shares.

If the 1959 amendment does not withdraw congressional consent to the taxation of national bank shares in view of the express consent still provided by section 5219, neither can it reasonably be construed as negating the implication of congressional consent to the taxation of shares in state banks established in *Lander*. The clear intent of section 5219 is to prohibit more favorable treatment of state banks than of national banks. *See Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 504 (1928); *Merchants' Nat'l Bank v. City of Richmond*, 256 U.S. 635, 638-40 (1921); *Mercantile Nat'l Bank v. New York*, 121 U.S. 138 (1887). Consequently, state taxation of state bank shares, as well as of national bank shares, falls within the original exception to the exemption provided by section 3701.

The same conclusion follows without consideration of the express exception. In the absence of that exception, it might be contended that there is a conflict between the 1959 amendment and the provisions of section 5219 consenting to state taxation of bank shares. Such an apparent conflict, however, would not render section 5219 ineffective because of the well-known principle that repeals by implication are not favored. This principle applies to federal statutes as well as state statutes, so that when acts of Congress are in apparent conflict, it is the duty of the courts to regard each as effective in the absence of a clearly expressed congressional intent to the contrary. *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133-34 (1974); *Morton v. Mancari*, 417 U.S. 535, 548 (1974). On this principle both section 5219 and the 1959 amendment can be given effect by construing section 5219 as a specific statute with respect to state taxation of bank shares and, therefore, as prevailing as against the more general exemption of federal securities provided by section 3701. This construction is in accordance with the rule that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 1753 (1980); *Morton v. Mancari, supra; Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). The effect of regarding the more specific statute as controlling is to interpret the provisions of the specific statute as an exception to the general statute. *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 198 S.W.2d 879, 881 (1947); *Sheffield v. State*, 307 S.W.2d 100, 104 (Tex. Crim. App. 1957); *Hallum v. Texas Liquor Control Board*, 166 S.W.2d 175, 177 (Tex. Civ. App.—Dallas 1942, writ ref'd).

The theory underlying this rule is explained in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-56 (1976), which involved a question similar to that now before us.

A national bank was sued for violation of the Securities Exchange Act, which provided that suit may be brought in any district where the violation occurred. The bank contended that venue of the suit was governed by a provision of the earlier National Bank Act, which provided that suit against a national bank "may be brought in the district in which such association may be established." The Supreme Court agreed that the earlier statute was controlling and that its more specific venue provision applying to national banks was not repealed by implication. The opinion of Justice Stewart states principles directly applicable to the present case:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). 426 U.S. at 153.

The Court went on to say that when Congress enacted the National Bank Act, it was focusing on the particular

problems of suits against banks, but that when it enacted the general provisions of the Securities Exchange Act, seventy years later, its focus was on the "broad universe of potential defendants subject to that Act." Consequently, under the principle of statutory construction previously stated, the Court held that in the absence of a "clear intention otherwise," the specific venue provision of the earlier National Bank Act controlled. *Id.* at 154.

By similar reasoning in the present case, it is apparent that when Congress enacted section 5219, it was focusing on the particular question of the taxation of bank shares, but when it amended section 3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest, from state and local taxation. Since there is no clear intention manifested by the amendment to extend the exemption to bank shares to the extent of the bank's holdings of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by section 5219.

This conclusion is confirmed by the legislative history of the 1959 amendment, which, though not the controlling evidence of legislative intent, indicates that the purpose of the Congress was to clarify and codify existing interpretations of the exemption rather than to abolish the distinction between a tax on bank shares and a tax on securities held by the bank. The Supreme Court has frequently resorted to committee reports and other legislative history to determine the purpose of statutes which, on their face, appeared no more doubtful than the statute now before us. *See, e.g., United Steelworkers v. Weber,* 443 U.S. 193, 201 (1979); *Muniz v. Hoffman,* 422 U.S. 454, 469 (1975); *United Housing Foundation v. Forman,* 421 U.S. 837, 849 (1975); *Philbrook v. Glodgett,* 421 U.S. 707, 714 (1975); *United States v. American Trucking Ass'n,* 310 U.S. 534, 543-44 (1940).

The legislative history of the 1959 amendment to article 3701 strongly indicates that Congress had no intention to withdraw the consent to state taxation of bank shares provided by section 5219. The amendment was included as section 105 in a bill designated as H.R. 9035, 86th Cong., 1st Sess. (1959), which raised the ceiling on the interest rates on series E and H United States Savings Bonds and made changes in other aspects of debt management. The House Committee on Ways and Means and the Senate Committee on Finance made identical reports to their respective houses concerning H.R. 9035. H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959), S.Rep. No. 909, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News 2769. In these reports the "Summary of Bill" contains the following statement:

> Fourth, the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes. *Id.*

No further reference to section 105 appears in the summary. The "General Statement" included in both of these reports contains the following:

> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. *The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (sec. 105) makes it clear* that the exemption for Federal obligations extends to every form

> of taxation that would require either the obligation, *or the interest on it,* or both, to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other non-discriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. [Emphasis added.] *Id.* at 2773.

It is noteworthy that the committee reports do not refer to the line of cases beginning with *Van Allen,* although they do refer to decisions holding interest on federal securities to be exempt and state that this interpretation is made explicit by the amendment. It seems highly unlikely that the reporting committees or either house of the Congress intended, by accepting these reports and enacting the proposed legislation, to abolish a distinction which had been well established by Supreme Court decisions and which had been characterized by the Supreme Court as one so "inextricably mixed with all taxing systems" that it "cannot be disregarded without bringing them into confusion which would be little short of chaos." *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907). This legislative history, therefore, confirms our conclusion that the purpose of Congress was to preserve, rather than expand, what the Supreme Court had construed to be the constitutional principle embodied in section 3701. *See Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143, 147 (1955). Consequently, we hold that the county's tax plan is not illegal because of its failure to deduct the federal securities held by the bank from its net assets in determining the value of its shares.

Discrimination Against Federal Securities

The bank and its shareholders also attack the validity of the county's method of assessing the bank's shares for taxation on the ground that it discriminates against United States obligations as an investment for banks. In an argument supporting this contention, *amici curiae* appearing on behalf of various banking associations assert that this discrimination consists of deducting the assessed value of the bank's real estate in computing the value of the shares without a similar deduction of obligations of the federal government held by the bank. They insist that the tax on bank shares imposed by article 7166 is unconstitutional because it is levied on the difference between the actual cash values of each share and the proportionate amount per share at which the bank's real estate is assessed for taxation. This discrimination, they argue, makes real estate a more attractive investment for the bank than federal securities and, therefore, is an unlawful interference with the federal government's power to borrow money, citing *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935).

We do not agree that the tax is an unlawful discrimination against federal securities. Article 7166 does not exempt the bank's real estate from taxation, but rather requires the bank to render it for taxation separately. In *Schuylkill*, by contrast, the trust company paid no tax on certain securities which were deducted from its assets in computing the tax on its shares because those securities were exempt from taxation. *Schuylkill* holds that to deduct other exempt securities from the bank's assets without deducting also federal securities in computing a tax on the company's shares unlawfully discriminates against federal securities.[6]

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[6]The *Schuylkill* opinion shows that some of the securities exempted by the Pennsylvania statute were shares in corporations which had paid a tax on their capital analogous to the Texas franchise tax. The Court evidently treated these shares like other

No such discrimination is shown in this case.

JUDGMENT

For the reasons stated, our former opinion is withdrawn, the appellees' motion for rehearing is granted, and appellants' motion for rehearing is overruled. Accordingly, the judgment of the trial court is affirmed.

CLARENCE A. GUITTARD
Chief Justice

Justices Akin and Robertson concur and join in this opinion.

CONCURRING OPINION BY JUSTICE ROBERTSON
JANUARY 23, 1981

On submission of this case and in the original briefs filed by appellees, section 5219 of the Revised Statutes of the United States was not called to our attention and argued as authorizing taxation such as that here involved. Consequently, that statute was not considered by this court in its original deliberations or opinion. In their motion for rehear-

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exempt shares because the corporations holding them paid no tax. This interpretation of the *Schuylkill* opinion is confirmed by the opinion on the subsequent appeal of that case, *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 (1938). Mr. Justice Roberts, again speaking for the Court, explained his opinion on the earlier appeal as holding "that the exclusion from the base of a proportion of the *tax-exempt* shares of Pennsylvania corporations and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter." (Emphasis added.) This treatment of both classes of shares as exempt from tax, so far as the share-holding corporation is concerned, is consistent with the distinction in *Van Allen*, between a tax on a corporation and a tax on its shareholders, which the first *Schuylkill* opinion expressly recognized and reaffirmed.

ing appellees now, for the first time, raise the consent statute in support of the interpretation they argued for in their original briefs. This argument places the case in a posture entirely distinct from the position in which it was originally presented to this court.

In our original opinion we relied heavily on *Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (Mont. 1978). Apparently, the argument now urged by appellees was not presented to that court either, although it did cite section 5219 (12 U.S.C. § 548) for another proposition. This being so, we must assume that the argument now advanced by appellees was not called to the attention of the Montana court in the form in which it is here argued and thus the argument with which we are presented was not considered by that court.

In *any* case, it is the function of this court, as a representative of the people it serves, to strive for a just resolution of disputes under the law. In *this* case, we are compelled, both legally and morally, to apply the law as enacted by the Congress and as interpreted by our Supreme Court. Anything less would be a breach of that sacred trust invested in us by those we represent.

In view of the foregoing, I concur in the opinion of the Chief Justice affirming the judgment of the lower court.

TED Z. ROBERTSON
Associate Justice

OPINION ON APPELLANTS' MOTION FOR REHEARING

May 1, 1981

The principal point made in the motion for rehearing is that since the express consent to state taxation of bank

shares formerly contained in section 5219 of the Revised Statutes, 12 U.S.C. § 548 (1964), was deleted by the sweeping revision of that section in 1969, there is no longer any congressional consent to taxation of bank shares which can be recognized as an exception to the exemption of federal securities in section 3701 of the Revised Statutes, 31 U.S.C. § 742 (1976). The 1969 revision deletes provisions specifically authorizing certain taxes on national banks and their shareholders and provides simply that a national bank shall be treated as a bank organized under the law of the state where its principal office is located. 12 U.S.C. § 548 (1976).

This argument may be plausible if only the current language of sections 5219 and 3701 is considered apart from the history of these two statutes. Nevertheless, since the revision of section 5219 does not expressly mention taxation of federal securities, the problem is one of construction, and we cannot properly determine the intent of these sections without reference to that history. Since we have concluded, for the reasons stated in our prior opinion, that the 1959 amendment to section 3701 was not intended to extend the tax exemption of federal securities to shares in banks holding federal securities, the question then becomes whether the 1969 revision of section 5219 was intended to have that effect. In considering this question, we are mindful of the rule that tax exemptions are strictly construed against the party asserting the exemption. *Conference of Major Religious Superiors of Women, Inc.* v. *District of Columbia*, 348 F.2d 783, 785 (D.C. Cir. 1965); *Lutkins v. United States*, 312 F.2d 803, 805 (Ct. Cl. 1963).

Our study of the 1969 revision of section 5219 and its legislative history gives no support to the contention that it was intended to extend the exemption so as to restrict the taxation of bank shares. That revision was made by

Public Law 91-156. Act of Dec. 24, 1969, Pub. L. No. 91-156, §§ 1(a), 2(a), 83 Stat. 434. We have examined the proceedings in Congress at the time Public Law 91-156 was under consideration. Cong. Rec. 35399 (November 21, 1969), 38634 (December 12, 1969); 1969 U.S. Code Cong. & Ad. News 1597. Public Law 91-156 delayed final application of the revised section 5219 for two years and provided for that period a temporary amendment by the terms of which the states' authority to tax national banks was broadened to include sales taxes and documentary-stamp taxes, but continued the authority to levy the taxes previously authorized, including bank-share taxes. Public Law 91-156 also directs the board of governors of the Federal Reserve System to make a study of the probable impact on the banking system and other economic effects of the permanent revision. Pursuant to these directions, the board prepared an extensive report to the Committee on Banking, Housing and Urban Affairs of the United States Senate, entitled STATE AND LOCAL TAXATION OF BANKS. Board of Governors of Federal Reserve System, — 92d Cong., 2d Sess., REPORT ON STATE AND LOCAL TAXATION OF BANKS (Comm. Print 1972) (hereinafter cited as STATE AND LOCAL TAXATION OF BANKS). This report reviews the various amendments to section 5219 and confirms the impression stated in our prior opinion that the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 9, 24.

According to this report, the intent of Public Law 91-156 to broaden rather than restrict state authority is shown by the fact that its enactment was precipitated by two restrictive decisions of the Supreme Court, *First Agricultural Nat'l Bank v. State Tax Commission*, 392 U.S. 339 (1968), and *Dickinson v. First Nat'l Bank*, 393 U.S. 409 (1969),

which invalidated state sales and use taxes and state documentary-stamp taxes with respect to national banks. STATE AND LOCAL TAXATION OF BANKS, *supra* at 336. Both the temporary amendment and the permanent revision of section 5219 authorized such taxes. The purpose of the temporary amendment was not to permit the states to find additional sources of revenue in lieu of taxes that would no longer be available, as suggested in the motion for rehearing. Its purposes, rather, were (1) to require the states to enact affirmative legislation if they desired to extend their general taxing statutes to national banks that had previously been exempt from such taxation because of the restrictions in section 5219, (2) to give the states an opportunity to amend statutes that had previously been tied textually to specific authorizations in section 5219, and (3) to continue the prohibition of state and local taxes on intangible property of national banks until the probable impact of such taxes could be studied by the board of governors of the Federal Reserve System. *Id.* at 312-18.

Reviewing the history of bank share taxes, the report recognizes the *Van Allen* rule that such taxes are levied on shareholders rather than on the banks, *id.* at 44, 231-234, 382-395, and also recognizes that in view of large holdings of federal securities by national banks, allowance of deductions for federal securities held by the banks would have the effect of nullifying all share taxes. *Id.* at 233. The report mentions the 1959 amendment to section 3701, 31 U.S.C. § 742 (1976), and proposes modification of the exemption of interest on federal securities. The discussion assumes that the existing exemption of such securities from property taxation would continue. *Id.* at 66, 67. The report gives no indication that either the 1959 amendment to section 3701 or the 1969 revision of section 5219 had any effect, separately or together, on the taxation of bank shares as previously recognized under the *Van Allen* rule.

In Public Law 91-156, Congress recognized the legality of bank shares taxes by continuing the authority of the states to impose these taxes in the temporary amendment, which retains the existing provisions authorizing states to impose certain taxes on national banks, including bank share taxes, and adds authority to impose certain specified additional taxes before the permanent revision takes effect. This continuation would have been pointless if the effectiveness of bank share taxes had been nullified by the 1959 amendment to section 3701. 31 U.S.C. § 742 (1976). That it was not pointless is demonstrated by statistical tables in the report, which show that in 1969-70 bank share taxes were in force in twenty-seven states and formed a substantial portion of the taxes paid by national and state banks at that time. *Id.* at 17, 386-88. Thus, it appears that abrogation of the *Van Allen* rule in 1969 would have had a substantial impact, which is not mentioned in the report.

It is most unlikely that this impact would have been overlooked if the 1969 revision had had the effect of withdrawing previous congressional consent to state taxation of the full shareholder interest in national bank shares as previously provided in section 5219, because Congress in 1969, as well as in earlier years, was sensitive to both the interests of the banking industry and the revenue needs of the state and local governments, as both the text of Public Law 91-156 and the report of the board of governors demonstrate. There is no evidence, however, in any legislative history that Congress considered either in 1959 or 1969 the economic impact of abrogation of the *Van Allen* rule, which the supreme court had previously recognized as one that could not be disregarded without bringing state and local taxing systems into confusion little short of chaos. *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907).

In the present case, the banks and their shareholders recognize in their motion for rehearing that the *Van Allen* rule originally rested on two grounds, (1) the distinction between taxation of shares and taxation of bank assets, and (2) congressional consent to state taxation of bank shares, as expressed in section 5219. Each of these grounds was sufficient in itself to uphold the validity of bank share taxes without any deduction for federal securities held by the banks. Neither the 1959 amendment to section 3701 nor the 1969 revision to section 5219 expressly abolishes this rule. The 1959 amendment does not affect the consent ground. Neither does the 1969 revision of section 5219 abrogate the *Van Allen* rule because its sweeping language clearly broadens rather than restricts the states' authority to levy taxes by giving them authority to treat national banks the same as state banks. If national banks must be treated the same as state banks, then shareholders in national banks must be treated the same as shareholders in state banks. Since the power of the states to tax the shares of state banks does not depend on congressional consent, except to the extent that federal securities may be involved, the *Van Allen* rule, previously applicable to state banks and their shareholders under the *Lander* decision, was continued by the 1969 revision with respect to national banks and their shareholders, whatever its original basis may have been. To hold that Congress intended by the 1969 revision to withdraw its consent to state taxation of bank shares to the extent of federal securities held by the banks is neither required by the language of Public Law 91-156, nor by any reasonable interpretation of that law in the light of its legislative history. Such a holding would be contrary to the principle above stated that tax exemptions are strictly construed against the party asserting the exemption. Consequently, we adhere to our opinion that the county properly assessed the tax on the shares of stock in question without

any allowance or deduction for federal securities held by the bank.

Appellants' motion for rehearing is overruled.

CLARENCE A. GUITTARD
Chief Justice

PUBLISH

Opposition

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No. 81-1717

In The

Supreme Court of the United States

October Term, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

v.

DALLAS COUNTY, ET AL.,
Respondents.

On Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF OF RESPONDENT CITY OF GARLAND, TEXAS AND TOM LANDRUM, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR OF THE CITY OF GARLAND, TEXAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 81-1717

In The

Supreme Court of the United States

October Term, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

v.

DALLAS COUNTY, ET AL.,
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OPINIONS BELOW

The summary opinion of the Court below in Cause #20915, of which this Respondent is a party, is stated at Page 1a of Petitioners' Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' jurisdictional statement.

SUMMARY OF ARGUMENT

The decisions below are in accordance with the well-settled principle of law that stockholders of a bank cannot have deducted, in determining the value of bank stock for taxation, the value of United States Bonds or Obligations owned by the bank.

ARGUMENT

The legal principle that United States Obligations are not to be deducted when determining the value of bank stock for taxation has been well established by this Court. (See *Van Allen v. Assessors*, 3 Wall. 573, 12 L.Ed. 229, *Home Savings Bank v. Des Moines*, 205 U.S. 503, 27 Sup.Ct. 571, 51 L.Ed. 901 (1907). Justice Moody stated as follows in the *Home Savings Bank* case:

> "Although the states may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of national securities held by the corporation whose shares are taxed."

The Texas Court of Civil Appeals[1] in the *Bank of Texas*[2] case determined that Dallas County's method of assessment of bank shares for taxation did not violate 30 U.S.C. § 742 and that Congress did not intend by the amendment to § 742 to withdraw its consent to state taxation of national or state bank shares. Rather, the amendment to § 742 merely sets forth in statutory form what had long

1 Now the Texas Court of Appeals. Tex. Const. Art.V § 6

2 *Bank of Texas, et al. v. Childs, et al.* (No. 20660) Contained at Page 6a, Appendix to Petitioners' Brief

been recognized as a prohibition against the individual taxation of United States Obligations through their inclusion in a tax upon all property of the taxpayer. (See *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 75 Sup.Ct. 607, 99 L.Ed. 950 (1955), *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 70 Sup.Ct. 413, 94 L.Ed. 439 (1950), *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U.S. 516, 34 Sup.Ct. 354, 58 L.Ed. 206 (1914).

Article 7166 (Tex.Rev.Civ.Stat.Ann.) provides the method for assessment of bank shares in Texas. Taxation of the personal property of a bank is effected by taxing the shares of stock directly to each shareholder. It is submitted that the value of any U. S. Obligations which may be owned by a bank is not "considered" when the price of a share of stock is established in the marketplace and is thus not "considered" by the taxing authority in computing the value of such share for tax purposes.

There is no discrimination against the United States Obligations involved in the bank shares tax as Petitioners assert. Petitioners contend that, since real estate previously taxed to the bank under Art. 7166, V.A.T.S., is deducted from the shares tax and U. S. Obligations are not, discrimination exists.

This Respondent takes issue with this contention for the following reasons:

(a) In *Schuylkill*,[3] the corporation stock had not been previously taxed to the trust company, whereas in the present case real estate has been previously taxed to the bank;

(b) 12 U.S.C. § 548 specifically grants consent to the taxation of real estate; and

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3 *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506 (1937)

(c) U. S. Obligations are a different type asset from real estate.

As stated, the federal statute provides consent to the taxation of real estate owned by national banks. In applying the *Schuylkill* analysis, real estate may only be taxed once under § 548. Therefore, since all banks in Texas are assessed first for their real estate, tax assessors are required to deduct the value of the real estate in computing the bank shares tax just as they were required to deduct national bank stock in *Schuylkill* when computing the share tax.

CONCLUSION

It is respectfully submitted that Petitioners have wholly failed to sustain the burden that special or important reasons exist for granting the writ. The decisions below involved a question of law that has been settled by this Court and said decisions were decided correctly. For the reasons set forth above, Respondent urges that the Writ of Certiorari be denied.

Respectfully submitted,

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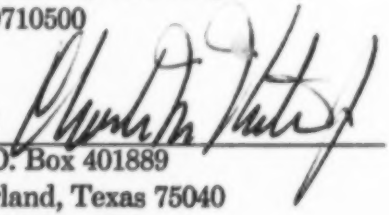
By: 
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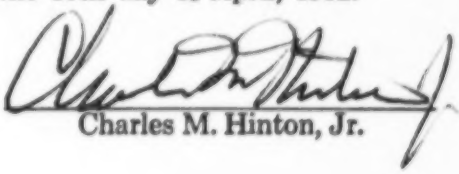
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of Respondents has been mailed to Marvin S. Sloman, 2500 South Tower, Plaza of the Americas, Dallas, Texas 75201, and to all other counsel of record on this the 16th day of April, 1982.



Charles M. Hinton, Jr.

Opposition

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IN THE

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DALLAS COUNTY, et al.,
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MEMORANDUM OPPOSING CERTIORARI FOR RESPONDENTS RICHARDSON INDEPENDENT SCHOOL DISTRICT; N. G. JOHNSON, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR FOR THE RICHARDSON INDEPENDENT SCHOOL DISTRICT; AND, THE BOARD OF EQUALIZATION FOR THE RICHARDSON INDEPENDENT SCHOOL DISTRICT AND ITS MEMBERS R. H. THOMPSON, NELSON McCORD, AND MORRIS JAMES

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No. 81-1717

IN THE

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Respondents RICHARDSON INDEPENDENT SCHOOL DISTRICT; N. G. JOHNSON, Individually and as Tax Assessor-Collector for the Richardson Independent School District; and, the BOARD OF EQUALIZATION for the Richardson Independent School District and its Members, R. H. THOMPSON, NELSON McCORD, and MORRIS JAMES (hereinafter collectively referred to as "R.I.S.D. Respondents"), respectfully request that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the judgments of the Court of Appeals for the Fifth Supreme Judicial District of Texas

at Dallas in *American Bank and Trust Company, et al. v. Dallas County, et al.* (No. 20915); *Bank of Texas, et al. v. Childs, et al.* (No. 20660); and *Wynnewood Bank & Trust, et al. v. Childs, et al.* (No. 20659), and represent to the Court as follows:

1. That the original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Appendix p. 44a.[1] The first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at Appendix p. 6a.[1] The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at Appendix p. 30a.[1]

The summary opinions of the court below in Cause Nos. 20915 and 20659, relying exclusively on the opinions in Cause No. 20660, were not reported and are reproduced at Appendix pp. 1a and 40a.[1]

2. That the "Statement of the Case" as stated by Petitioners is substantially correct.

3. That applicable reasons for denial of a writ have been fully developed in the briefs of other Respondents. Accordingly, the R.I.S.D. Respondents adopt and incorporate as if fully set forth herein the argument and authority for denial of a writ as contained in the Brief(s) in Opposition of other Respondents herein.

It is the position of the R.I.S.D. Respondents that such adoption and incorporation is both legally and practically desirable insofar as it will avoid the duplication of legal argument which would otherwise necessarily result due to the identity of legal issues and position shared by Respondents herein.

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[1] The Appendix referred to has been reproduced in the Petition for Writ of Certiorari filed herein by Petitioners.

THEREFORE, for the reasons contained in the Brief(s) in Opposition adopted herein by R.I.S.D. Respondents, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

Supreme Court, U.S.
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On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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April 23, 1982

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

1. Respondents have made no attempt to show that the Questions Presented are not important and substantial federal questions, and for the reasons stated in the petition the questions are substantial.[1]

2. Respondents Dallas County, et al., assert that the decision in the *Montana Bankers Association* case is not in conflict with the decision below, claiming that the Montana tax was upon the banks while the tax in the present case is upon bank stockholders (Brief in Opposition of Dallas County, et al., pp. 5-6). This contention is demonstrably incorrect. Montana Revised Codes Ann. §§ 84-307, 4603-4605

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[1] Respondents' briefs in opposition primarily and at length address the merits, not the reasons for granting the writ. Petitioners will address the merits (and respondents' arguments) in full at an appropriate time if review is granted by this Court.

(1978); *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909, 911-912 (1978); *First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913, 914 (1978). The Montana Supreme Court specifically held that the tax was one upon the stockholders, even though the bank was the collection agent. *Montana Bankers Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909, 911-912 (1978). *Accord, First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913, 914 (1978). The court below in its original opinion and upon rehearing recognized that the Montana tax is indistinguishable from the present tax. *See* Appendix to Petition pp. 48a-51a; 16a (615 S.W.2d at 817); 29a-30a (615 S.W.2d at 823).

The decision below is in conflict with the Montana decision on an important and substantial question of federal law.

3. Respondents' argument that question 1 of the Questions Presented has already been decided by this Court is based on decisions before 1959. Those decisions obviously cannot have determined the effect of the 1959 amendment to 31 U.S.C. § 742. This Court has never had the opportunity to address that question.

4. Respondents Dallas County et al., assert that petitioners did not previously raise their claim of discrimination against United States obligations. (Brief in Opposition of Dallas County, et el., pp. 21-22). That contention is untrue. This claim was raised in the trial court pleadings in cause No. 20915,[2] and in the points of error in the court of

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[2]Second Amended Petition and Application for Injunction, Paragraph 14 (Transcript p. 46).

appeals in that cause.[3] This claim was made by Petitioners[4] to the court below, and considered, discussed and denied by that court in all three causes. Appendix to Petition pp. 1a, 28a-29a, 40a. The claim was made in all the causes in applications for writ of error to the Supreme Court of Texas.[5]

This claim is properly before this Court. *Payton v. New York,* 445 U.S. 573, 583 n.19 (1980).

5. Since the petition was filed in the present case, a jurisdictional statement was filed in *Bartow County Bank et al., v. Bartow Board of Tax Assessors, et al.,* No. 81-1834, in which the validity of the Georgia bank share tax is challenged as violating 31 U.S.C. § 742, as amended in 1959. The Georgia bank share tax, like the tax involved here, is computed on the banks' net assets without a deduction for United States obligations.

That case further demonstrates the need for review of this important question by this Court.

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[3]Point of error 2 in Brief of Appellants in cause No. 20915.

[4]Brief of Appellants pp. 28-33 (in No. 20915), p. 27 (in No. 20660), and p. 23 (in No. 20659).

[5]Point of error No. 5 in each of the applications to the Supreme Court of Texas.

PRAYER

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Amicus Brief

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MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION

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MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. The Association has sought the consent of all the numerous parties to this action, and some such consents have been received. They are attached hereto. In the event that additional written consents are received, they shall be promptly filed.

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association is the largest national trade association of the commercial banking industry, numbering among its members approximately 13,130 banks, or over 90% of the industry. Association members are located in each of the fifty states and the District of Columbia, and include both national banks and banks chartered by their respective states.

As a class, commercial banks are a major holder of United States government obligations. On the latest date for which figures are available, $684 billion in U.S. Treasury securities was held by non-federal government entities;[1] over $103 billion of this debt was in the hands of commercial banks. In addition, some $69 billion in debt of other federal agencies was held by banks. A substantial portion of all that debt is held by commer-

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[1] Federal Reserve Bulletin, February, 1982, p. A-32 (figures for November, 1981).

cial banks in Texas and the six other states which have comparable bank share tax laws[2] as shown by the following chart:

	U.S. Treasury Securities ($ millions)	Obligations of U.S. Government Agencies ($ millions)
Texas	$ 7,832.7	$ 4,385.7
Georgia	1,316.5	1,240.2
Ohio	4,695.8	2,747.2
Pennsylvania	6,581.8	5,557.3
Louisiana	3,117.6	1,460.3
Nevada	251.5	168.3
West Virginia	942.9	1,361.5
TOTAL	$24,738.8	$16,920.5

(*Source:* FDIC Item Reference List, Cycle 48, March 13, 1982).

Obviously, the inclusion or exclusion of such huge sums of money in the base from which tax calculations are made will make a substantial difference in the state or local tax liability of commercial banks or their shareholders.

Since federal law specifically forbids consideration of U.S. obligations in the computation of state and local taxes (with some non-material exceptions), and since the interpretation of the pertinent federal law by a court of appeals for the State of Texas is at odds with other state courts' constructions of the same law, thereby injecting confusion into the whole area of

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[2] *See Ga. Code Ann.* § 91A-3301; *La. Rev. Stat. Ann.* §§ 47:8, 47:1967; *Nev. Rev. Stat.* ch. 367.020-070; *Ohio Rev. Code Ann.* §§ 5709.04 and 5711.01(B) (3); *Pa. Stat. Ann.* tit. 72, §§ 7701 *et seq; W. Va. Code* ch. 11-3-14, 11-3-14a.

state and local taxation of U.S. government obligations, the American Bankers Association here respectfully appears to represent the interests of its members nationwide, and of their shareholders.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District of Texas In Dallas

---

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

The American Bankers Association respectfully submits this brief as *amicus curiae* to urge the Court to grant the petition for a writ of certiorari to review a decision of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas. The court, in that decision, concluded that when a state or political subdivision chooses to tax the shares of a bank it may, consistent with federal law, include in the computation of the value of those shares obligations of the United States held by the bank.

As shown in the foregoing motion, that result could have a tremendous impact upon the state tax liability of ABA member banks in Texas and in other states having similar tax laws.

SUMMARY OF THE ARGUMENT

This case involves the application of 31 U.S.C. § 742, as amended in 1959, to the tax laws of Texas, and, by logical extension, the tax laws of other states as well. The federal statute is designed to exempt U.S. obligations from taxation by states or localities, and the exemption extends even to the consideration of U.S. obligations, directly or indirectly, in the computation of state and local taxes. The Texas bank share tax is an effort to circumvent that statute. The issues presented are important questions of federal law which have not been decided by this Court, although similar questions arising prior to the 1959 amendment to 31 U.S.C. § 742 have been deemed to be of sufficient importance to warrant review by the Court on numerous occasions.

The proper interplay between federal exemptions and a state's taxing scheme is an important issue, not only because of the interests of the commercial banking industry, as set forth in the foregoing motion, but also because the decision of the court below infringes upon the marketability and costs of U.S. government debt instruments, to the detriment of the government's constitutional power to borrow money. This will be particularly so if the decision of the court below is followed as a precedent in similar cases in states having similar tax laws. Even if the case is not followed by other courts, it should be reviewed because of the existence of a conflict among state courts in the construction of 31 U.S.C. § 742.

Moreover, the decision of the court below is incorrect because it fails to apply the plain meaning of the federal statute, relying instead upon irrelevant legislative history of the National Bank Act and its amendments. The net effect of the court's decision will inevitably be discriminatory taxation of U.S. obligations in the hands of commercial banks. Such a decision on an important question of federal law should not be permitted to stand unreviewed and unreversed.

ARGUMENT

I.

The State's Attempted Encroachment On The Borrowing Power Of The United States Presents, In Its Present Posture, An Important Question Of Federal Law Which Has Not Been Decided By The Supreme Court, But Should Be.

Article 7166 of the Texas Civil Statutes Annotated (1960) authorizes the imposition of a tax upon the shareholders of commercial banks, not officially upon the banks themselves. As a practical matter, the banks generally pay the tax due, a practice which is recognized and facilitated by Internal Revenue Code § 164(e). The tax is imposed upon the actual cash value of each share of a bank, minus the value of a proportionate amount of the bank's real property. Since real property is taxed separately, this deduction is necessary to avoid double taxation. Part of the "actual cash value" of bank shares (based on book value or net asset value) consists of a proportionate amount of United States obligations held by the bank, but the taxing authorities of the state of Texas do not permit banks to deduct the value of these obligations in the computation of the actual cash value of each bank share.

Exemption of U.S. instrumentalities and obligations from state and local taxation has a long history, dating back to *McCullough* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819), Chief Justice Marshall's seminal opinion on the Constitution's Supremacy Clause. That case involved Maryland's effort to impose a tax upon notes issued by the Bank of the United States. This Court disallowed the tax because "the power to tax involves the power to destroy." *Id.* at 431.

> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable con-

> sequence of that supremacy which the constitution has declared.

Id. at 436.

One of the "powers vested in the general government" is the power to borrow. In *Weston* v. *City Council of Charleston*, 2 Pet. (27 U.S.) 449 (1829), this Court specifically held that federal government obligations are immune from state taxation because state taxation would constitute an encroachment on the borrowing power. In two Civil War-era cases, *Bank of Commerce* v. *Commissioners of Taxes & Assessments of the City and County of New York*, 2 Black (67 U.S.) 620 (1862), and the *Bank Tax Case*, 2 Wall. (69 U.S.) 200 (1864), the Court specifically applied this reasoning to efforts by the states to impose taxes upon the value of the capital of banks which consisted partially or entirely of stock of the United States.

In 1862, the constitutional principles laid down in these cases were codified by Congress in the Act of Feb. 25, 1862, c. 33, § 2, 12 Stat. 346, providing that

> all stocks, bonds and other securities of the United States held by individuals, corporations or associations within the United States shall be exempt from taxation by or under state authority.

After enactment of this statute, the Supreme Court continued to hold U.S. government securities exempt from direct and indirect taxation by the states and localities:

> It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose.

Missouri v. *Gehner*, 281 U.S. 313, 320-21 (1930).[1]

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[1] For purposes of comparison: In 1929 and 1930, this Court felt it terribly important to decide issues involving possible state encroachment on the

> The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a nontaxable subject at once suggests the probability that it was the latter rather than the former that the lawmaker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that "what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

The MacAllen Co. v. *Massachusetts*, 279 U.S. 620, 629 (1929) (citations omitted).

It should be clear, therefore, that in the absence of a statute to the contrary, the Constitution bans the states and localities from imposing taxes, either directly or indirectly, upon U.S. government obligations. This is not to say, however, that Congress may not *consent* to what would otherwise be unconstitutional encroachment on the government's borrowing power. To a degree, that is precisely what Congress did in Section 41 of the 1864 National Bank Act, Act of June 3, 1984, c. 106, 13 Stat. 111. That statute specifically provided that it should not be construed to prevent

> all the shares in any of the said associations (*i.e.* national banks) held by any person or body corporate, from being

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borrowing power of the federal government at a time when the federal government's debt was $16.301 billion (as of December 31, 1929, according to the Federal Reserve Board, *Banking and Monetary Statistics*, p. 509 (1943)). Since then, the federal government's need to exercise its borrowing power has taken a quantum leap. The present debt of $1.05 trillion (Daily Treasury Statement, March 11, 1982) is over *64 times* as much. How much more important it is today to preserve and protect the borrowing power of the federal government as against state encroachment!

> included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority.

At first blush, Section 2 of the Act of Feb. 25, 1862 and Section 41 of the National Bank Act, enacted within two years of one another, appear to contradict each other. On the one hand, the 1862 statute makes all U.S. government obligations exempt from state and local taxation; on the other, the 1864 statute (without repealing the former statute) consents to some state and local taxation.

This Court resolved the apparent conflict in *Van Allen* v. *Assessors*, 3 Wall. (70 U.S.) 573 (1866), by upholding New York's "power to authorize the taxation of the shares of national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States." *Id.* at 582. In that case the Court reasoned that U.S. obligations were exempt from state taxation, but in point of fact, those obligations were not being taxed by New York. The *bank* in question was the owner of the U.S. obligations, but *it* was not subject to the tax. The tax was imposed upon the *shareholders* of the bank, and those shareholders did not *own* U.S. government obligations — they owned non-exempt shares of the bank. Consequently, the Court concluded that both statutes could co-exist. For ninety years, the Court reaffirmed the reasoning of the *Van Allen* case time and again. *People ex rel. Duer* v. *Commissioners of Taxes & Assessments of City & County of New York*, 4 Wall. (71 U.S.) 244 (1867); *First National Bank of Louisville* v. *Kentucky*, 9 Wall. (76 U.S.) 353 (1870); *Cleveland Trust Co.* v. *Lander*, 184 U.S. 111 (1902); *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103 (1923); *Society for Savings in the City of Cleveland* v. *Bowers*, 349 U.S. 143 (1955). Needless to say, however, all of the cases cited were based upon the statutes then in effect — statutes in derogation of the usual principles of absolute immunity of U.S. obligations from direct or indirect state taxation.

In 1959, the 1862 statutory exemption from state taxes for government obligations was amended. No longer did it merely prohibit the imposition of state taxes upon U.S. government obligations. Instead, it extended the prohibition

> to *every form* of taxation that would require that either the obligations or the interest thereon, or both, be *considered, directly or indirectly*, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

(Pub. L. No. 86-346, Tit. I, § 105, 73 Stat. 621 (1959), codified as 31 U.S.C. § 742). (Emphasis supplied).

As we show in the following section of this brief, the 1959 amendment to the statute makes the *Van Allen* line of cases no longer controlling. In any event, it is clear from the cases cited above that this Court has frequently found the issue of possible state encroachments upon the borrowing power of Congress to be an important issue requiring review by the Court.[2] That remains true in this case, particularly since the Court has not had an opportunity since 1959 to determine the meaning and effect of the amendments to 31 U.S.C. § 742 enacted that year. An important issue of federal law is thus presented in a new form which has not been, but should be, resolved by the Supreme Court.

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[2] In fact, just this term the Court has felt it necessary to deal with the same kind of issue, holding in *United States* v. *New Mexico*, ____ U.S. ____, 50 U.S.L.W. 4326 (3/24/82), that, in the absence of a statute, or where an agency or instrumentality is so closely connected to the government that the two cannot realistically be separated, a state tax on a federal contractor "does not offend the notion of federal supremacy." In this case, of course, a statute does exist which clearly prohibits the imposition of the tax here involved.

II.
The Court Below Incorrectly Decided The Important Issue of Federal Law.

Prior to 1959, 31 U.S.C. § 742 had simply exempted U.S. government obligations *per se* from state taxation. It permitted taxation of bank shareholders calculated upon the value of their shares, even if that value depended in some degree upon U.S. obligations held by the bank. But Congress withdrew this partial consent to taxation. Since 1959, it has been unlawful even to *consider* U.S. obligations, or interest earned on them, in computing state taxes, except for franchise or other non-property taxes, estate or inheritance taxes.

The law is plain and unambiguous. Where this is so, except in the case of a "clearly expressed legislative intention to the contrary," the language of the statute itself must ordinarily be regarded as conclusive. *Bread Political Action Committee* v. *Federal Election Commission*, ____ U.S. ____ , 50 U.S.L.W. 4291, 4292 (1982), citing *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

A bank share tax is not a "franchise or other nonproperty tax." *City & County of Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79, 81 (1940); *Spokane & Eastern Trust Co.* v. *Spokane County*, 70 Wash. 48, 126 P. 54 (1912). And, of course, it is not an estate or inheritance tax. Even though this particular tax does not fit within the exception clause of § 742, Texas *does* "consider" U.S. obligations in calculating bank share taxes. The state's failure to allow a deduction of these obligations from the tax base has a considerable impact upon the "actual cash value" of each bank share.

It should be clear, therefore, that if the plain meaning of the statute is applied here, the Texas bank share tax is unlawful insofar as it includes U.S. obligations in the base on which the tax is calculated.

The court below engages in a seriously tortured analysis to escape this conclusion. It seizes upon the opening phrase of present 31 U.S.C. § 742, "Except as otherwise provided by law . . .;"[3] struggles to find some law which provides otherwise; and settles on a law which was repealed thirteen years ago!

As we indicated earlier, a section of the National Bank Act enacted in 1864 allowed under certain circumstances for state taxation of national bank shares (which in the absence of statute would be exempt from state taxation).[4] The court below points out that, in 1959, when Congress amended 31 U.S.C. § 742, it did not at the same time amend the consent to taxation found in the National Bank Act. The court concluded from this that Congress must *not* have intended to change the *Van Allen* line of cases upholding state taxation of bank shares. The court below goes on to say that when in 1969 Congress repealed old section 41 of the National Bank Act (12 U.S.C. § 548 (1957)), its only purpose was the elimination of the last vestiges of discrimination between state and national banks with respect to state taxation, and had nothing to do with the direct or indirect taxation of U.S. obligations. The court below concluded that that repeal did not overrule the *Van Allen* line of cases either. This conclusion raises an interesting question about how this case might have been decided had it come before this Court between 1959 and 1969, but it is a question which does not require an answer. The fact of the matter is, Congress *did* repeal old section 41 of the National Bank Act which had allowed for

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[3] Whether this phrase was ever even enacted into law is subject to considerable dispute. It does not appear in § 3701 of the Revised Statutes (18 Stat. 731 (1873)), but seems to have been put there in 1926 by codifiers of the U.S. Code. *See* 31 U.S.C.A. § 742 (West Supp. n. 1981).

[4] *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931).

taxation of national bank shares. That section of the law was replaced, in 1969, with the following:

> § 548. State taxation
>
> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

As amended, Dec. 24, 1969, Pub. L. No. 91-156, § 2(a), 83 Stat. 434.

Obviously, the 1969 version of the statute no longer specifically authorizes a state to tax "all the shares" of a bank. The law merely requires now that state and national banks shall be treated alike insofar as state taxes are concerned. Thus, we are left with *only* the provision of law which prohibits consideration of U.S. obligations in computing state taxes unless "otherwise provided by law," and *no other* law now provides otherwise. Whether *Van Allen* and its progeny were correct interpretations of the law in effect at the time or not is no longer relevant; that law has changed, and it is incorrect to adhere to that line of cases any longer. The court below erred in holding otherwise.

III.
The Decision Of The Court Below Will Result In Discrimination Against Commercial Banks.

The banks' petition for writ of certiorari points out the conflict among the state courts construing 31 U.S.C. § 742.[5] While resolution of such a conflict is certainly an important

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[5] *Montana Bankers Association* v. *Montana Department of Revenue*, 580 P.2d 909 (Mont. 1978), is directly contrary to the holding of the court below in this case; *Bartow County Bank* v. *Bartow County Board of Tax Assessors*, Nos. 37868 *et al.*, Supreme Court of Georgia, Jan. 6, 1982, reaches the same result as did the court below in this case.

reason for the Court to grant certiorari, no purpose would be served by our repetition of the banks' argument in this respect. There is, however, one additional state court case which we consider to be of particular importance. The reasoning behind that decision is somewhat at odds with the reasoning of the Texas court in the decision sought to be reviewed here.

In May, 1981, the Supreme Court of Rhode Island decided the case of *Federal Products Corp.* v. *Norberg*, 429 A.2d 447 (R.I. 1981). That case differs from the present one principally in that the taxpayer is not a bank. It is a corporation which manufactures and sells precision instruments. The corporation invested substantial amounts of its cash in U.S. Treasury notes and bonds. The state imposed upon all corporations a "Business Corporation Tax" which applied to the gross receipts of businesses. Federal Products was assessed with a deficiency, part of which resulted from inclusion within the gross receipts proceeds from the sale of federal securities and interest earned on those securities. The state's Tax Administrator argued that

> the proceeds and the interest derived from these obligations were not included in the total taxable income but were merely used to measure the amount of the net income subject to tax.

Id. 429 A.2d at 448.

The Rhode Island Supreme Court disagreed, holding that the Administrator had

> attempted to do indirectly that which he could not do directly, to wit, levy a tax on tax-exempt federal securities. Such a tax is expressly prohibited by Title 31 U.S.C.A. § 742 (1976).

Id.

Federal Products is particularly important because it came before the court unencumbered by the legislative history of the National Bank Act, as amended from time to time. No one could, or did, seriously argue that the legislative history of state

taxation of state banks or national banks or the shares of one or another, had anything to do with the taxability of obligations of the U.S. government in the hands of a precision instrument manufacturer. Thus, the *Federal Products* case presented a clean issue of interpretation solely of 31 U.S.C. § 742, with the result that the U.S. obligations were not taxed, directly or indirectly.

The withdrawn opinion of the court below indicates that the same result would have been reached in an identical case in Texas. *Only* because of the phrase "except as otherwise provided by law" appearing in the statute, and *only* because of the history of laws pertaining only to banks, was the court below able to reach a contrary conclusion in this case, and it is consequently reasonable to assume that the result in this case will be limited to U.S. obligations held by banks.

If the court below is correct in holding that former laws permitted state taxation of bank shares and somehow still do, though they have been repealed, then very clearly there will be discrimination against U.S. government obligations in the hands of commercial banks. Part of the allure of government securities is their exemption from state taxation under 31 U.S.C. § 742. As this Court has recognized, a state's share tax law which includes U.S. government securities in the taxable base "seems inevitably to increase the burden of the tax by reason of their ownership."[6] So in this case, where the state imposes an "increased burden" upon banks (not shared by non-bank holders of government securities), its actions can only have one of two effects: It will discourage banks — major holders of government securities — from investing in or holding such securities, or, alternatively, it will encourage banks to

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[6] *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 120 (1935), holding the tax in that case to be a violation of the Borrowing Clause of the Constitution.

raise the cost of lending to the government. In either case, the state's law, if permitted to stand, can only frustrate, burden and impede the federal purpose, which cannot be allowed. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

CONCLUSION

For all of the reasons stated herein, the *amicus* American Bankers Association, on behalf of its 13,130 member banks, respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BANK AND TRUST COMPANY, et al.,

Petitioners,

vs.

DALLAS COUNTY, et al.,

Respondents.

ON CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Brief of Dale National Bank as Amicus Curiae in Support of Petition for Writ of Certiorari

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ON CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

Motion for Leave to File an Amicus Curiae Brief in Support of Petition for a Writ of Certiorari

Dale National Bank hereby respectfully requests permission to file the attached Amicus Curiae Brief in support of this Court granting certiorari in the above-captioned matter for the reasons stated therein.

Respectfully submitted,

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ON CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF OF DALE NATIONAL BANK AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF INTEREST

Dale National Bank (hereinafter referred to as Dale) is a national bank organized and existing under the laws of the United States of America with its principal office located in Johnstown, Pennsylvania.

The Commonwealth of Pennsylvania imposes the Pennsylvania Bank Shares Tax, Pa. Cons. Stat. 72 §7701 (Purdon Supp. 1982), against the shares of stock of Dale. The tax, which is substantially similar to the tax imposed against the shares of the Petitioners by the State of Texas, Tex. Rev. Civil Stat. Ann. Art. 7166 (Vernon 1960), is paid directly by Dale out of its funds.

Dale currently has several appeals pending before the Pennsylvania Commonwealth Court and various administrative appeal boards which raise the same issue concerning the effect of the 1959 amendment, Pub. L. No. 86-346, Title I, §105(a), 73 Stat. 622 (1959), to section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976), as is presented in the Petition for a Writ of Certiorari which this Amicus Brief supports.

II.

SUMMARY OF ARGUMENT

In 1959, Pub. L. No. 86-346, §105(a), 73 Stat. 622 (1959) expanded the scope of the exemption from state taxation of United States obligations previously set forth in section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976). The effect of the clear, unambiguous language of P.L. 86-346 is to exempt the value of United States obligations held by banks from state taxation of the shares of stock of banks, as measured by the value of the assets of the banks. That section 3701, as amended by P.L. 86-346, exempts United States obligations held by banks from state bank shares taxation is supported by decisions of this Court and the intent of Congress in enacting P.L. 86-346. The improper interpretation of section 3701, as amended by P.L. 86-346, by the Texas Courts results in increased borrowing costs to the Federal government and renders section 3701 violative of art. I, §8, cl. 2 of the Constitution of the United States.

III.

ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Point I

The petition for Writ of Certiorari should be granted because the Texas courts have rendered an opinion contrary to the clear language of a federal law.

Prior to 1959, section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976), read as follows:

> All stocks, bonds, Treasury notes, and all other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority.

Section 3701 was amended in 1959 by the addition of the following sentence:

> This exemption extends to every form of taxation that would require that either the obligation or the interest thereon, or both, be considered, either directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Pub. L. No. 86-346, §105(a), 73 Stat. 622 (1959).

The effect of the plain, unambiguous language of P.L. 86-346 is to expand the scope of the exemption previously set forth in section 3701. The amendatory language of P.L. 86-346 clearly exempts the value of United States obligations held by banks from state taxation of the shares of stock of banks, as measured by the value of the assets of the banks. This has been recognized by the Supreme Court of Montana which has held that

section 3701, as amended by P.L. 86-346, exempts United States obligations in the computation of the Montana Bank Shares Tax. *Montana Banker's Association v. Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978).

The Montana Supreme Court properly stated: "The language of the 1959 amendment is clear, unambiguous, direct and certain. The plain language provides an exemption to *every form of state taxation that requires United States obligations or interest to be considered directly or indirectly in the computation of the tax.* The statute speaks for itself." Id. at 117, 580 P.2d at 912 (emphasis in original). Accord, *First Security Bank v. Montana Department of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978).

The Supreme Courts of Georgia and Texas, however, have declined to follow the decision of the Supreme Court of Montana and has decided that obligations of the United States are *not* exempt in the computation of the bank shares taxes imposed by those states. *Bartow County Bank v. Bartow County Board of Tax Assessors*, No. 37868, slip op. (Ga., January 6, 1982); *Bank of Texas v. Childs*, 615 S.W.2d 810, Rehearing denied, 615 S.W.2d 810 (Tex. Civ. App. 1981).

There is no question that a bank shares tax considers, directly or indirectly, United States obligations held by banks in the computation of the tax. This Court has consistently held that although a state tax on the shares of a bank is a tax on the shares in the hands of the shareholders of the bank, such a tax is clearly measured by and considers the assets of the bank in the computation of the tax, including United States obligations and interest thereon owned by the Bank. *Society for Savings v. Bowers*, 349 U.S. 143 (1955); *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923).

Thus, the decisions of this Court concerning the nature of a bank shares tax mandate that the value of United States obligations and interest thereon be exempted from the computation of such taxes pursuant to section 3701 of the Revised States of the United States, as amended by P.L. 86-346.

The Texas courts have failed to comprehend that the issue involved in the cases for which a Petition for Writ of Certiorari is before the Court is one of interpretation of a federal statute which is plain and unambiguous on its face. The Georgia courts have done likewise. Rather, in an obvious attempt to circumvent section 3701 of the Revised Statutes, as amended by P.L. 86-346, these courts have rendered erroneous opinions in which the reasoning is strained, and contrary to settled principles of statutory construction. In essence, the opinions of the Texas and Georgia courts have rendered meaningless the Amendment to section 3701 which Congress intended to effect through P.L. 86-346.

Furthermore, the opinion of the Texas courts rests upon a provision of section 3701 *which was never enacted into law*. The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas states:

> Although we originally reached the same conclusion as the Montana court, further examination of section 3701 in light of decisions of the Supreme Court has persuaded us that *the Montana decision is unsound because it ignores the opening words of the statute, 'Except as otherwise provided by law,'* and also ignores another statute, Section 5219 of the Revised Statutes of the United States, which falls within this exception.

Bank of Texas v. Childs, 615 S.W.2d 810, Rehearing denied, 615 S.W.2d 810 (Tex. Civ. App. 1981), at 817 (emphasis added).

The Texas courts apparently did not realize that the introductory clause, "Except as otherwise provided by law," is not part of section 3701 of the Revised Statutes of the United States, but was inserted by the codifiers of the 1926 United States Code. Since this section of the United States Code has not been enacted into positive law, the introductory clause is not part of the statute. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

In states such as Pennsylvania which impose bank shares taxes similar to those imposed by Montana, Georgia and Texas, the conflicting decisions of the appellate courts of those states have created great uncertainty regarding the proper computation of the bank shares tax. With respect to Pennsylvania alone, your Amicus would respectfully request that the court take judicial notice of the fact that there are currently several hundred appeals concerning the Pennsylvania Bank Shares Tax filed in the Pennsylvania appellate courts or before administrative boards of appeal. The conflicting opinions of the Supreme Courts of Texas, Montana and Georgia clearly indicate that this important question of federal law should be settled by this Court.

This Court is the only federal court which has jurisdiction to hear an appeal concerning section 3701. 28 U.S.C. §1341 (1977); *Rosewell v. La Salle National Bank*, 450 U.S. 503 (1981). Your Amicus respectfully urges the Court to grant the Petition for Writ of Certiorari in the cases in question and render a decision regarding the proper interpretation of section 3701 of the Revised Statutes of the United States, as amended by P.L. 86-346.

Point II

The decisions of the Texas courts are not only contrary to the clear, unambiguous language of a federal law, but are contrary to the expressed congressional intent in enacting such law.

It is a fundamental principle in the construction of a federal statute that the language of the statute controls when it is sufficiently clear on its face. *Ernst & Ernst v. Hockfelder*, 425 U.S. 185 (1976). The language of P.L. 86-346 is utterly without ambiguity and a review of the legislative history of that act is not necessary to resolve the issue before the Court. However, should such a review be made, the legislative history of P.L. 86-346 fully supports the proposition that P.L. 86-346 was intended to extensively expand the exemption provisions of section 3701 so as to exempt the value of United States obligations and interest thereon owned by banks from the computation of state bank shares and other types of taxation.

Public Law 86-346 was enacted as a comprehensive attempt to secure greater marketability for United States obligations. S. Rep. No. 909, 86th Cong., 1st Sess. (1959). Senate Report 909 states:

> Under the amendment, a new sentence is added to section 3701 [§742]. The new sentence makes it clear that the exemption now provided by §3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax . . . .

1959 U.S. Code Cong. & Ad. News 2769, 2777.

The intent of Congress to increase the scope of the exemption provided by section 3701 prior to its amendment by P.L. 86-346 is also evidenced by the explicit exclusion from the exemption provisions of section 3701

which is provided for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof . . . and estate or inheritance taxes." It is apparent from the existence of such exclusions that Congress in enacting P.L. 86-346, fully realized the impact of P.L. 86-346, considered the limitations which it determined should be imposed on the broad language of P.L. 86-346 and specifically set forth those limitations in the form of exclusions from the exemption of certain forms of taxation. The existence of these exclusions from the exemption provisions of section 3701, as amended by P.L. 86-346, constitutes an affirmation by Congress of the application of the provisions of P.L. 86-346 to all forms of taxation not excepted. *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263 (1839). *If Congress had intended to exclude bank shares taxes from the expanded exemption provided by section 3701, as amended by P.L. 86-346, it would have specifically done so.*

Point III

The improper interpretation of section 3701 by the Texas courts results in increased borrowing costs to the federal government and renders section 3701 violative of art. I, §8, cl. 2 of the Constitution of the United States.

This Court decided in *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829) that obligations of the United States government are immune from state taxation under the "Borrowing" Clause of the United States Constitution, art. I, §8, cl. 2, and the settled constitutional doctrines announced in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This immunity recognizes that the state taxation of United States obligations adversely affects the marketability of those obligations by increasing their market price thereby rendering them less attractive to purchasers. *Missouri Insurance Company v. Gehner*, 281 U.S. 313 (1930).

Banks hold substantial amounts of United States obligations of many types and descriptions. The decision of the Texas Courts adversely affects the marketability of United States obligations by effectively reducing the yield of such obligations held by banks. This results in United States obligations being less attractive investments for banks than would otherwise be the case. Thus, the ability of the federal government to borrow money is hindered and burdened by the inclusion of the value of United States obligations and interest thereon held by banks in the computation of a state bank shares tax.

The imposition of such a burden on the marketability of United States obligations is clearly contrary to art. I, §8, cl. 2 of the United States Constitution and related decisions of this Court. *National Life Insurance Co. v. United States,* 277 U.S. 508 (1928).

IV.

CONCLUSION

For the foregoing reasons, your Amicus respectfully urges that the Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas be issued.

Respectfully submitted,

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Amicus Brief

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ON FILED
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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District of Texas In Dallas

MOTION OF THE TEXAS ASSOCIATION OF APPRAISAL DISTRICTS, THE TEXAS ASSOCIATION OF SCHOOL BOARDS, THE TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, THE TEXAS COUNCIL OF SCHOOL ATTORNEYS, AND THE TEXAS MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN OPPOSITION TO PETITION

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October 12, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1717

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District of Texas In Dallas

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MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Texas Association of Appraisal Districts, the Texas Association of School Boards, the Texas Association of School Administrators, the Texas Council of School Attorneys, and the Texas Municipal League hereby respectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached Brief as Amici Curiae in opposition to the petition for a writ of certiorari.

STATEMENT OF INTEREST

Under present Texas law,[1] the authority to value property for ad valorem tax purposes is vested in each county-wide appraisal district. Through the process of appraising and equalizing property values, the appraisal district establishes the property tax base for all local governments within the county.

The Texas Association of Appraisal Districts is a statewide organization whose purpose is to promote effective and efficient property tax administration in Texas. One hundred and twenty-six appraisal districts are members of the Texas Association of Appraisal Districts.

The Texas Association of School Boards represents over 1,000 school boards from throughout the State of Texas. Its member schools educate 99% of the total elementary and secondary student population. School districts in Texas must rely heavily on property taxation as a source of revenue.

The Texas Association of School Administrators represents over 1,000 school district superintendents from across the State of Texas.

The Texas Council of School Attorneys is comprised of over 150 practicing attorneys who represent school districts in Texas.

The Texas Municipal League is an association of some 830 incorporated municipal governments of Texas. Property tax revenues provide a vital source of income to the cities and towns of Texas.

The relief sought by Petitioners would adversely affect the stability of the local property tax base in Texas. The Legislative Budget Board of the Texas Legislature has projected that unsuccessful state legislation to accomplish the same

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1. TEX. PROP. TAX CODE (Vernon 1982) (Effective January 1, 1982).

objective would have had the following fiscal implications:[2]

Fiscal Year	Revenue Loss to Local Governments
1982	$ 99,000,000
1983	108,900,000
1984	119,800,000
1985	131,700,000
1986	144,900,000

Similar losses to the local governments of Texas are anticipated in the event that Petitioners should prevail.

WHEREFORE, it is respectfully requested that the Court grant the Texas Association of Appraisal Districts, The Texas Association of School Boards, the Texas Association of School Administrators, the Texas Council of School Attorneys and the Texas Municipal League leave to file the attached brief as amici curiae in opposition to the petition for a Writ of Certiorari.

Respectfully submitted,
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Texas Municipal League

October 12, 1982

2. Texas Legislative Budget Board, Fiscal Note to House Bill No. 955, 67th Leg., Reg. Sess. (1981).

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No. 81-1717

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

vs.

DALLAS COUNTY, *et al.*,
Respondents.

ON CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF OF TEXAS ASSOCIATION OF APPRAISAL DISTRICTS, TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, TEXAS COUNCIL SCHOOL ATTORNEYS AND TEXAS MUNICIPAL LEAGUE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

It is a well-settled rule that the states may tax the interest of a shareholder in his stock without deducting from the value of that stock any United States obligations held by the corporation. For over a century, both the decisions of this Court and the acts of Congress have permitted this form of taxation. 31 U.S.C. §742 prohibits the taxation of a bank where its federal securities are considered in the computation of the assessment against the bank. However, this statute has no application to the separate taxation of a shareholder on the value of his bank stock.

The Texas statute does not discriminate against United States obligations and does not violate Article I, §8, cl. 2

(the Borrowing Clause) of the United States Constitution. Texas law merely prevents the double taxation of real property owned by the bank: the bank is assessed on its real estate, and the bank shareholders are assessed on their stock, less the value of the bank's real estate. As both types of property are taxed at the same rate, no discrimination can or does result.

The decisions of the state courts are not in conflict. The Texas and Georgia Supreme Courts upheld the taxation of bank shares in the hands of the shareholder, where the amount of federal obligations held by the bank has no effect on the value of the property taxed. The Montana Supreme Court invalidated the taxation of capital assets in the hands of the bank, where the amount of federal obligations held by the bank was not deducted from its taxable value.

ARGUMENT

I. The petition for Writ of Certiorari should be denied because federal law clearly supports the decisions of the Texas courts.

TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960) (repealed January 1, 1982) imposed a tax upon the shareholders of state and national banks doing business in Texas. Each share was appraised for taxation by subtracting the proportionate value of the bank's real estate from the market value of its stock. This method of assessment prevented double taxation of the real property, as taxes on the real property were separate assessed directly to the banking corporation. No deduction of the value of federal obligations was authorized. While each shareholder remained liable for the taxes due on this stock, as a matter of custom the banks would often pay these taxes for their shareholders.[1]

1. Both this method of appraisal and the bank's option to serve as collecting agent for its shareholders have been codified as §§23.11 and 25.14, respectively, of TEX. PROP. TAX CODE ANN. (Vernon 1982) (effective January 1, 1982).

Since 1866 this Court has upheld the authority of the states to tax the stockholders' interests in a corporation, based on corporate assets, without deducting the value of any United States securities held by the corporation. In *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 593 (1866), the issue faced by this Court was whether the states could impose a tax upon the shares of the national banks held by the shareholders, where the bank capital was invested entirely in United States obligations. In upholding this form of taxation, the Court distinguished the taxable property interest of the shareholder in his shares from a tax upon the assets owned by the corporation:

> The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his portion of the property that may remain of the corporation after the payment of its debt. This is a distinct independent interest or property held, by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen on referring to it. *Id.* at 584.

See also *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353 (1870); *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923).

This distinction has also been applied to cases involving a tax on the shareholders of state banks. The Court has permitted the value of state bank stock to be measured by corporate assets which include federal obligations. *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902).

Nor does a requirement that the bank pay such a tax as agent for its shareholders offend the general rule that federal obligations are immune from state taxation. *Corry v. Baltimore*, 196 U.S. 466 (1905).

Even where the practical impact of a shareholder tax upon corporate-owned federal obligations is indistinguishable from that of a tax imposed upon the corporation itself, "this exception to the general rule of immunity is firmly embedded in the law." *Society for Savings v. Bowers*, 349 U.S. 143, 148 (1955) (Harlan, J.).

Petitioners erroneously contend that the 1959 amendment to 31 U.S.C. §742 (Rev. Stat. 3701) reversed almost a century of well-settled case law following the reasoning of *Van Allen, supra*. The 1959 amendment states:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate or inheritance taxes (31 U.S.C. §742).

The effect of this amendment, as evidenced by the intent of Congress, was merely to clarify and codify the existing general rule of immunity and not to eliminate any established exception to that rule. The Senate Finance Committee Report on the bill containing this amendment states that the amendment "makes it clear that both the principal and interest on U. S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes." S. REP. NO. 909, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2769. The report further offers the following explanation of the object sought by the amendment:

> D. CLARIFYING EXEMPTION OF U. S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
> Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on United States

> obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one state has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable income is determined. The bill (Sec. 105) makes clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. *Id.* at 2773.

And in the House floor debate on this legislation, Chairman Mills of the House Ways and Means Committee similarly described the amendment as merely "a reaffirmation of the exemption from certain local taxes on Federal Bonds." 105 CONG. REC. 18157 (1959). Absent entirely from the legislative histories is any intention to prohibit or restrict state taxation of bank shareholders' stock.

Instead, the objective of the 1959 amendment was to overcome a legal fiction utilized in "one state" that attempted to include interest on federal obligations in gross income for purposes of its individual income tax. According to the Secretary of the Treasury, the State of Idaho had argued that its tax was not on exempt income, but " 'upon every individual . . . measured by his net income.' " *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 71 (1959) [hereinafter cited as *House Hearings*]. In his written statement, the Secretary attributed the following purpose to the 1959 amendment:

> In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute

> more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general. *Id.* at 72.

Clearly, the addition of the second sentence to 31 U.S.C. §742 had a finite objective inapplicable to the tax in question. The distinction between an individual and his income sought by the State of Idaho has not been recognized historically by this Court. In seeking to resolve this one, isolated controversy, neither the Executive nor the Legislative branches advocated or anticipated a result so far-reaching as that argued by Petitioners. The legislative history of the 1959 amendment is void of any intention to overturn nearly a hundred years of holdings following *Van Allen, supra*, nor to accomplish any purpose other than the resolution of the Idaho income tax issue. In his brief for the United States as amicus curiae, the Solicitor General supports this conclusion (Amicus Br. of Solicitor General 16).

Neither the explicit language of the 1959 amendment nor the legislative intent support the interpretation sought by Petitioners. "Exemption from taxation does not rest upon implication." *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). "It must be remembered that statutory exemptions for tax purposes are a matter of legislative grace, and must be strictly construed." *Lutkins v. United States*, 312 F.2d 803, 805 (Ct. Cl.), cert. denied, 375 U.S. 825 (1963). See also *Texas v. Moody's Estate*, 156 F.2d 698, 700 (5th Cir. 1946); *Conference of Major Religious Superiors v. District of Columbia*, 348 F.2d 783, 785 (D.C. Cir. 1965).

Petitioners claim that the Texas tax on bank stock "indirectly considers" federal obligations in which the bank has

invested, violating Petitioners' broad interpretation of 31 U.S.C. §742 as amended. This reading attributes an exaggerated meaning to the 1959 amendment well beyond the specific purpose sought by Congress. Long before the 86th Congress, the general rule of immunity had been carried forward by this Court to preclude indirect as well as direct taxation of United States obligations through their inclusion in a tax imposed on all the property of a taxpayer. *The MacAllen Complaint v. Massachusetts*, 279 U.S. 620, 629 (1929); *Society for Savings v. Bowers, supra*, 349 U.S. at 144. The reference to indirect taxation in the 1959 amendment merely codifies this well-settled application of the immunity rule. The new significance of this amendment is to clarify that the immunity rule applies to interest as well as principal on Federal obligations, where such interest might otherwise be subject to state income taxation.

It is doubtful that this legislation was even necessary to achieve the goal of defeating Idaho's tax scheme. See *Miller v. Milwaukee*, 272 U.S. 713 (1927); *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U.S. 136 (1927); *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 675-767 (1950). But rather than litigate this issue, the Department of the Treasury and the Department of Justice recommended that "the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations *and the interest on them* from every form of State and local *income taxes*. The proposed provision (the 1959 amendment) would accomplish that purpose." *House Hearings, supra*, at 71 (emphasis added).

Petitioners cannot reconcile the direct conflict which their interpretation of 31 U.S.C. §742 would pose with 12 U.S.C. §548 (REV. STAT. 5219). From 1864 to 1969, 12 U.S.C. §548 specifically permitted the States to fully tax the

interests of shareholders in national bank stock. Petitioners do not explain how, for an entire decade, one federal statute (12 U.S.C. §548) could explicitly allow a tax which another (31 U.S.C. §742) allegedly prohibits. This Court has refuted an identical argument involving earlier versions of both statutes:

> The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§5219) by another (§3701), between which their is no want of harmony. *Cleveland Trust Co. v. Lander, Id.* at 115.

Congress reiterated its intent to permit continued state taxation of bank stock in 1969, when 12 U.S.C. §548 was amended to broaden the authority of the states to impose varied forms of taxation on national banks. On November 21, 1969, Senator Proxmire commented in the Senate debate on the object sought by the amendment:

> The purpose of the bill is to try to give the States an opportunity to tax the banks in those States on an equitable basis.
>
> This is hard to do because the present law, Section 5219 of the Revised Statutes, currently provides a list of taxes which can be imposed on national banks by States or their political subdivisions. The list is explicit and contains a number of detailed and cumbersome exceptions. The courts have repeatedly ruled that the taxes specified in Section 5219 are exclusive; that is, they are the only taxes that can be imposed by a State government on a national bank.
>
> This method of restricting State taxation of national banks had its inception approximately 100 years ago.
>
> Incidentally, the committee is in full accordance with the principle that every State government should be al-

> lowed the greatest possible degree of autonomy with regard to the formulation of its tax structure. Accordingly, the committee agrees in principle with the objective of the bill passed by the House of Representatives." 115 CONG. REC. 35399 (Nov. 21, 1969).

Some three weeks later, Senator Tower reiterated the same intent:

> [T]he necessity for new sources of State revenue and the unpopularity of the presently unwarranted immunities of national banks militate for rapid action to clear national banks for new taxes such as sales taxes, documentary taxes, and motor vehicle taxes. The 1970 provision does this adequately, and hence I support the conference report in that respect. 115 CONG. REC. 38634 (Dec. 12, 1969).

Absent entirely from the Congressional history is any intention to repeal the longstanding authority of the States to levy a tax on bank stock. The Senate Banking and Currency Committee Report stipulates that the 1969 amendment is meant to expand and not restrict the taxing authority of the States:

> The committee is in full accord with the principal that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure.
> * * *
> The committee wants it clearly understood that the prohibition . . . is not a prohibition against the continued imposition of any tax under the authority of Section 5219 as it now reads. S. REP. NO. 91-530, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 1594, 1595, 1596.

Therefore, 31 U.S.C. §742 and 12 U.S.C. §548 should be read harmoniously as authorizing the States to tax the stock of both state and national banks, without regard to federal obligations held, but requiring the States to treat

state and national banks alike. Petitioners' interpretation would necessitate the implicit repeal of provisions of §548 by the enactment of the 1959 amendment to §742 since the deduction of federal obligations would produce a negative value of bank stock in most instances. Those remaining banks receiving substantial reductions in the value of their stock would be encouraged by their shareholders to purchase additional federal obligations in order to avoid local taxation entirely. As a further consequence, banks would discriminate against state and local government obligations in their investments, in order to maintain a portfolio that would effectively exempt their shareholders' stock from taxation. Such a policy would clearly run contrary to the policy of Congress to authorize more flexibility in local taxation while continuing all previously authorized forms of taxation.

Petitioners actually seek not an exemption of federal obligations, but a de facto exemption of the bank stock itself. Evidence presented in the lower courts demonstrates that if all federal obligations held by the bank were deducted from the value of the net assets, as Petitioners advocate, "nothing would remain to be divided proportionately among the shareholders." *Bank of Texas v. Childs*, 615 S.W.2d 810, 816 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Again, such a reading would place 31 U.S.C. §742 in direct conflict with 12 U.S.C. §548 by removing all purpose to be served by the latter provision.

Petitioners pretend that only one method of arriving at the value of bank stock may be utilized under Texas law: the "book value" method. Under the book value method, the aggregate value of a bank's shares is determined by summing the amounts shown on the bank's financial statement for capital, surplus, undivided profits, and certain reserves. The value of the bank's real property is then deducted from this total to prevent its double taxation. The remainder rep-

resents the total value of all the bank's shares. The bank would then be taxed on the value of its real property and the shareholders on the value of their shares.

Neither Article 7166 nor its successor statutes dictate a particular method or computation to be used in appraising bank stock. The Texas statutes require only that the market value of the real property owned by the bank be subtracted from the actual cash value of the bank's stock. "There is no exclusive method for determining the fair cash market value of bank stock." TEX ATT'Y GEN. OP. NO. WW-1208 (1961).

Petitioners, then, would ignore the "market" method of assessing bank stock in order to distort book value calculations. Under the more accurate market method, the value of bank stock is determined by identifying what a share has sold for recently in the open market. This selling price is multiplied by the number of shares outstanding to arrive at a total value of the bank's stock. Again, the value of the bank's real property is subtracted from this total. The remainder represents the total taxable value of the bank's shares, which is divided proportionately among the shareholders.

The market method is professionally accepted as the preferred method of appraisal. The book value method is used only as a guide in arriving at market value, and then only if market information is unavailable. The tax assessor must adjust the book value upward or downward if he has knowledge that it does not reflect true market value. Indeed, the market value of bank stock usually exceeds its book value. See TEXAS STATE PROPERTY TAX BOARD, GENERAL APPRAISAL MANUAL §12, Appraisal of Financial Institutions, at FI-6 to FI-8 (1980).

By its own terms, 31 U.S.C. §742 is inapplicable both to Article 7166 and to the accepted practices of assessing

bank stock under Texas law. The exemption of federal obligations extends only to those "forms of taxation that would *require* that . . . the obligations . . . be *considered* . . . in the *computation* of the tax . . ." (emphasis added). Whether the tax is computed using the market method or the book value method, consideration of federal obligations is neither required nor optional, but is instead irrelevant. Hence, "the plain language of the statute, its origin, and its purpose"[2] permit Texas' present form of taxation of bank stock.

In his amicus curiae brief, the Solicitor General observes that if not for the enumeration of explicit exceptions in the 1959 amendment, state franchise and inheritance taxes could no longer apply to federal obligations. Since taxation of bank shares is not included in this list, the Solicitor General deduces that the value of bank stock must now be reduced by the amount of United States securities held by the bank. (Amicus Br. of Solicitor General 18). This conclusion cannot be reached without overruling the distinction in property interests recognized in *Van Allen, supra*. "The question in this case is whether the amended statute has legislatively overturned the decisions that concededly would have upheld the Texas statute prior to 1959" (Amicus Br. of Solicitor General 20).

Under a franchise or inheritance tax, any federal securities under consideration are owned by the taxpayer himself. But in the instant case, the federal securities of a bank are not owned by the taxpayer-shareholder but by the banking corporation. *Van Allen, supra*, and its progeny have no application to a corporate franchise tax or an inheritance tax. Without these statutory exceptions, the exemption of United States obligations would expand into these forms of

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2. *Nat'l Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979).

taxation. But because a bank shareholder does not own the federal obligations owned by his bank, no similar exception is necessary for the tax in question. The absurdity of an opposite reading can best be illustrated from the examples provided by the Solicitor General.

Clearly a state could not impose inheritance taxes on a bequest of federal government bonds without the statutory exception in the 1959 amendment. Under the interpretation offered by the Solicitor General, the value of any taxable stock must be reduced to the extent that it is enhanced by corporate investments in federal obligations. Therefore, an inheritance of stock in such a corporation would also be exempt from state inheritance taxes, but for the federal statutory exception.

Similarly, the Solicitor General cites two other forms of taxation that are limited without exception by the 1959 amendment. "[S]tate gift taxes cannot be applied to gifts of government bonds made after 1959," nor can a state now impose its income tax on gains from the sale of United States bonds (Amicus Br. of Solicitor General 19). It must follow from his treatment of Texas' bank stock tax that a state would also be prohibited from taxing a gift of stock in a corporation that heavily invested in federal securities. Likewise, a state or local income tax could not apply to an individual who realized dividend income or a gain from the sale of stock in such a corporation.

It is clear from the legislative record that Congress had no intention to so limit, if not disrupt, the tax structures of the states. Absent entirely from the history of the 1959 amendment is any discussion whatsoever of these consequences. Yet if *Van Allen, supra*, has been overturned, then such results must necessarily flow from the repeal of the shareholder-corporation distinction.

II. The petition for Writ of Certiorari should be denied because the Texas tax does not discriminate against United States obligations.

Petitioners also allege that the Texas tax on bank shares discriminates against U. S. obligations in violation of U.S. CONST. art. I, §8, cl. 2 (the Borrowing Clause). Petitioners point to the requirement of state law that the value of the bank's real property be deducted from the market value of its stock to arrive at the taxable value of that stock. State statutes do not authorize a similar deduction for the value of federal obligations.

As previously mentioned, the purpose of subtracting the value of the bank's real property is to prevent double taxation of this property. The bank is liable for the taxes on its real property, and the bank shareholders are liable for the taxes on their respective shares. TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960). These tax liabilities reflect the respective property interests of the parties.

The Texas courts have closely scrutinized this deduction to prevent the exemption of real property owned by a bank. For example, where the value of an office tower was not included and considered in arriving at the value of the stock, the bank shareholders were not entitled to deduct the value of the office tower from the market value of their stock. *City of Midland v. Midland National Bank*, 607 S.W.2d 303 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

Were the real property of a bank exempt from taxation in Texas, Petitioners' assertion might have merit. However, real property is taxable at the same rate as bank stock. Moreover, the ability of a bank to shift its assets from federal securities to real estate is closely restricted. Both federal and state law place strict limitations on the real estate holdings of a bank. 12 U.S.C. §29; TEX. REV. CIV. STAT. ANN. art. 342-501 et seq. (Vernon 1973).

III. The petition for Writ of Certiorari should be denied because there is no conflict between the states.

Petitioners claim that the decisions of the Supreme Courts of Texas,[3] Georgia[4] and Montana[5] are in conflict. An examination of the Montana statute demonstrates a fundamental difference in its tax scheme which distinguishes the Montana holding.

Montana law levied a tax directly against the bank upon its assets. The banking corporation itself was liable to the state for the tax assessment. The shareholders themselves incurred no tax liability but only a duty to reimburse the bank upon request. The Montana statute provided, in pertinent part:

> The bank or banking corporation in which such shares are owned shall be liable for the payment of taxes assessed against such shares, and such taxes shall be payable by and may be collected from such bank or banking corporation in the same manner and under the same penalties as other taxes; provided that such bank or banking corporation may recover from such owners shares any taxes so paid on such shares, and shall have a lien therefor upon such shares and upon any dividends accrued or to accrue thereon. (MONT. REV. CODES ANN. §84-4605 (1947)).

The Montana tax was plainly not a tax upon the shareholder's property interest in his stock, but upon the bank's property interest in its assets. The Montana Supreme Court recognized that the Montana tax was assessed against the corporation in defining the question before it.

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3. *Bank of Texas, supra.*

4. *Bartow County Bank v. Bartow County Bd. of Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), appeal docketed, No. 81-1834 (Apr. 5, 1982).

5. *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978) (3-2 decision).

> This appeal presents a single issue: Is a Montana *bank* entitled as a matter of law to claim and deduct for state "Bank Shares Tax" purposes those United States government obligations owned by it on tax assessment day? *Montana Bankers Association, supra*, 580 P.2d at 911 (emphasis added).

As previously discussed, the Texas statute at issue places upon the shareholder the liability for taxes assessed against his bank stock. The bank bears no liability for these taxes, and is liable only for the taxes against the real property which it owns. TEX. REV. CIV. STAT. ANN. art. 7166. The Texas courts have enforced this distinction, holding an assessment against a bank by a city upon the stock of the bank as unauthorized. *City of Marshall v. State Bank of Marshall*, 127 S.W. 1083 (Tex. Civ. App. 1910, writ ref'd).

Montana, then, employed a different tax plan than that authorized by Texas law. The *Van Allen* line of decisions has no application to the Montana tax, since that tax does not rest upon the shareholder-corporation distinction. The Georgia statute, like the Texas law, assessed the tax upon the bank's shareholders rather than the bank itself, and the Georgia decision specifically follows the Texas holding in *Bank of Texas, supra*. GA. CODE ANN. §91A-3301 (1980); *Bartow County Bank, supra*.

CONCLUSION

For all of the reasons stated herein, your Amici respectfully urge this Court to deny the petition for a Writ of Certiorari.

Respectfully submitted,

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No. 81-1717

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
PETITIONERS

v.

DALLAS COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the tax on bank shares imposed by Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960) violates 31 U.S.C. 742 (Rev. Stat. 3701) to the extent that obligations of the United States owned by the bank are not excluded in the valuation of shares subject to tax.

2. Whether the tax on bank shares imposed by art. 7166 discriminates against obligations of the United States in violation of the Constitution of the United States.

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District of Texas In Dallas

MOTION OF THE TEXAS ASSOCIATION OF APPRAISAL DISTRICTS, THE TEXAS ASSOCIATION OF SCHOOL BOARDS, THE TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, THE TEXAS COUNCIL OF SCHOOL ATTORNEYS, AND THE TEXAS MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN OPPOSITION TO PETITION

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October 12, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1717

AMERICAN BANK AND TRUST COMPANY, ET AL.,
PETITIONERS

v.

DALLAS COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of May 17, 1982 to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The original opinion of the court below (Pet. App. 44a-52a), withdrawn upon rehearing, is not reported. The opinions of the court below upon first and second motions for rehearing (Pet. App. 6a-30a, 30a-36a) are reported at 615 S.W.2d 810 and 823. The memorandum opinions in related cases that are included in

the petition for certiorari (Pet. App. 1a, 40a) are unreported.

JURISDICTION

The judgments of the court below were entered on January 23, 1981 (Pet. App. 37a, 41a), and June 3, 1981 (Pet. App. 2a). Petitions for rehearing were denied on May 1, 1981 (Pet. App. 38a, 42a), and July 1, 1981 (Pet. App. 3a). Applications for writs of error to the Supreme Court of Texas were denied on January 6, 1982 (Pet. App. 4a, 39a, 43a). The petition for a writ of certiorari was filed on March 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

These are suits instituted in a state court in Dallas County, Texas, by a number of banks, state and national, principally located in Dallas County, and by shareholders in those banks individually and, in one of the cases, in a representative capacity. They sought mandamus and declaratory and injunctive relief against Dallas County and other taxing subdivisions of the State of Texas, and officers and Boards of Equalization of those taxing subdivisions, with respect to the assessed values on the basis of which an annual ad valorem tax on bank shares for 1979 was imposed. (Pet. ii-vii; Pet. App. 6a-7a, 44a-46a.)

Article 7166 of Texas Revised Civil Statutes Annotated (Vernon 1960) in 1979 [1] required each bank doing business in the State to make returns of its real estate to the local tax assessor, and at the same time

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[1] Article 7166 was repealed effective January 1, 1982, but has been succeeded by similar provisions of the new Texas Property Tax Code (Pet. 3 n.4).

to submit a sworn list of its shareholders, with the address and number of shares of each. The shareholders were required to make return of their shares "at their actual value" to the tax assessor where the bank was located, and each share was to be taxed at the difference between "its actual cash value" and the proportionate amount per share at which the bank's real estate was assessed.[2]

In determining the "actual cash value" of shares of bank stock subject to tax, respondents totalled the capital accounts of a bank, subtracted the assessed value of its real estate, and divided the result by the number of shares outstanding. They did not eliminate from capital accounts the value of obligations of the United States owned by the bank. (Pet. App. 14a-15a, 48a.) Petitioners claimed that 31 U.S.C. 742 (Rev. Stat. 3701) required that the value of the bank shares be reduced by the value of obligations of the United States held by the bank.[3] They asked that

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[2] Banks sometimes pay such taxes on behalf of their shareholders. See *Hillsboro National Bank* v. *Commissioner*, 641 F.2d 529 (7th Cir. 1981), cert. granted, No. 81-485 (Jan. 18, 1982). Cf. *Des Moines Bank* v. *Fairweather*, 263 U.S. 103, 110-112 (1923). The opinions of the court below do not indicate whether the banks in these cases did so. Section 164(e) of the Internal Revenue Code of 1954 (26 U.S.C.) allows a bank, if unreimbursed by its shareholders, to take the deduction for taxes paid.

[3] Petitioners also asserted that the tax imposed by art. 7166 had been repealed by Tex. Rev. Civ. Stat. Ann. art. 7150.6 (Vernon Cum. Supp. 1981), exempting most intangible property from taxation; or if not, that the Texas Constitution prohibited treating bank shares differently from other intangible property. The court rejected those claims (Pet. App. 6a-14a, 46a-48a).

the assessed values be reduced accordingly. (Pet. App. 6a-7a, 14a-15a, 44a, 48a, 51a-52a.)[4]

The trial court denied relief (Pet. App. 7a, 44a). The Court of Civil Appeals, agreeing with two then-recent decisions of the Supreme Court of Montana,[5] reversed (Pet. App. 44a-52a). It held that "the plain language of [31 U.S.C.] section 742 as amended exempts United States obligations from being considered in the computation of any state or municipal or local tax. The tax here in question is illegal because United States obligations were included in determining the actual cash value of the property to be taxed" (Pet. App. 50a).

On motions for rehearing the court set aside its earlier judgment, and affirmed the judgment of the trial court (Pet. App. 5a, 6a-29a). It had become convinced that the decisions of the Montana Supreme Court were unsound because the Montana Court had not considered 12 U.S.C. 548 (Rev. Stat. 5219), which, it asserted, consents to the local taxation of national banks or bank shares, and had ignored the initial clause of 31 U.S.C. 742, which begins: "Except as otherwise provided by law * * *."[6] The court

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[4] The court below pointed out that in at least one of the cases there was evidence that if both the real estate assessed to the bank and the value of obligations of the United States held by the bank were eliminated, the remaining net assets of the bank would be reduced to zero (Pet. App. 15a).

[5] *Montana Bankers Association* v. *Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978); *First Security Bank* v. *Montana Department of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978).

[6] The court referred to this clause as the opening clause of Rev. Stat. 3701 (Pet. App. 16a). Actually, it appears only in the unenacted 31 U.S.C. 742, and has never been a part of

pointed out that in a series of decisions, this Court had held that the predecessor of 12 U.S.C. 548 (originally Section 41 of the Act of June 3, 1864, ch. 106, 13 Stat. 111 (the National Bank Act)) permitted state taxation of shares of the stock of national banks without reduction in value because of obligations of the United States held by the bank in question. *Van Allen* v. *The Assessors*, 70 U.S. (3 Wall.) 573 (1866); *Des Moines Bank* v. *Fairweather*, 263 U.S. 103 (1923); cf. *Society for Savings* v. *Bowers*, 349 U.S. 143, 147-148 (1955). It concluded that the clause introducing 31 U.S.C. 742 referred to 12 U.S.C. 548, and that since that clause had not been eliminated by the 1959 amendment to Section 742, the consent given by 12 U.S.C. 548 had not been withdrawn (Pet. App. 16a-22a). The court reached the same conclusion on the alternative ground that repeals by implication are not favored, and that the legislative history of the 1959 amendment showed no intention to withdraw the consent given in 12 U.S.C. 548 (Pet. App. 23a-27a). The court also rejected an argument that the Texas statute discriminated against obligations of the United States because it allowed a deduction for real estate but not for federal obligations (Pet. App. 28a).

Petitioners moved for a further rehearing on the ground that the court's reliance on 12 U.S.C. 548 was misplaced; it had been amended in 1969 simply to provide: "For the purposes of any tax law enacted under authority of the United States or any State, a

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Rev. Stat. 3701. Although we will generally refer to 31 U.S.C. 742 for the sake of clarity, the effective statutory provision applicable to this case is Rev. Stat. 3701, as amended by the Act of Sept. 22, 1959, Pub. L. No. 86-346, Section 105(a), 73 Stat. 622. See page 22 and note 28, *infra*.

national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Act of Dec. 24, 1969, Pub. L. No. 91-156, Section 2, 83 Stat. 434. The court denied the motion, stating that tax exemptions should be strictly construed against the party asserting the exemption (Pet. App. 31a), and that "the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks" (Pet. App. 32a). The Supreme Court of Texas denied applications for writs of error (Pet. App. 4a, 39a, 43a).

DISCUSSION

This case presents a clear conflict concerning the meaning and application of 31 U.S.C. 742 between decisions of the Montana Supreme Court, see note 5, *supra*, on the one hand, and on the other, the decision of the court below and the subsequent decision of the Supreme Court of Georgia in *Bartow County Bank* v. *Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), appeal docketed, No. 81-1834 (Apr. 5, 1982). The Montana court found the language of Section 742 "clear, unambiguous, direct and certain" in requiring that the assessed value of bank shares be reduced by the value of obligations of the United States held by the bank. *Montana Bankers Association* v. *Montana Department of Revenue*, *supra*, 580 P.2d at 912. The court below originally agreed with the Montana Court that "the plain language of Section 742 as amended exempts United States obligations from being considered in the computation of any state or municipal or local tax" (Pet. App. 50a). But it later concluded that "the Montana

decision is unsound" (Pet. App. 16a), and found Section 742 qualified by its reference to other federal statutes, and by its legislative history. The Georgia court agreed.

The Treasury Department advises us that resolution of this issue will have a significant impact upon the borrowing power of the United States. If the decision of the Texas court of appeals is followed elsewhere, as it has been in Georgia, such taxes will effectively reduce the yield of federal obligations, and make them less attractive investments for banks and their shareholders. The value of the federal obligations at stake is substantial (see Pet. 10; Amicus Br. of American Bankers Association ii-iii).

After the Montana decisions referred to above, the Montana legislature repealed the State's tax on bank shares and added banks to the list of corporations subject to the State's corporate license tax, measured by net income. Mont. Code Ann. §§ 15-31-101, 15-31-113, 15-31-703 (1981). The decisions of the Montana Supreme Court will, however, presumably be invoked in the five states[7] other than Texas and Georgia that retain taxes specifically on bank shares. They will be equally relevant in those states that impose ad valorem taxes on shares of stock of other types of corporations[8] that may hold government bonds, as well as

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[7] La. Rev. Stat. Ann. §§ 47:8 (West 1970) and 47:1967 (West Cum. Supp. 1982); Nev. Rev. Stat., §§ 367.020 to 367.070 (1981); Ohio Rev. Code Ann. §§ 5709.04, 5711.01(B)(3) (Page 1980); Pa. Stat. Ann. tit. 72, § 7701 (Purdon Cum. Supp. 1982); W. Va. Code §§ 11-3-14, 11-2-14a (1974).

[8] See, *e.g.*, Fla. Stat. Ann. § 199.032 (West Cum. Supp. 1982). In 1977 Tennessee, which had had an annual ad valorem tax on shares of banks, loan companies, investment companies, and cemetery companies, among others (Tenn. Code Ann. § 67-715 (1976)), eliminated the tax on bank

in questions concerning the impact of Section 742 on other forms of state taxation. Cf. *Federal Products Corp.* v. *Norberg*, 429 A.2d 447 (R.I. 1981).

I. TEXAS'S BANK SHARE TAX IS INCONSISTENT WITH 31 U.S.C. 742 (REV. STAT. 3701)

Section 742 provides that the exemption of obligations of the United States from state or local taxation "extends to every form of taxation *that would require* that either *the obligations* or the interest thereon, or both, *be considered, directly or indirectly, in the computation of the tax* * * *" (emphasis added). Article 7166 requires that every shareholder of a bank report his shares to the tax assessor "at their actual value." Each share is to be taxed at "its actual cash value," reduced by its proportionate interest in the bank's real estate.

As this Court has pointed out, the value of a share of stock in a going business is usually determined by its selling price, the price the owner "could have obtained if it had sold the stock on the valuation date[.]" *United States* v. *Cartwright*, 411 U.S. 546, 551 (1973). Cf. Treas. Reg. §§ 20.2031-2(b), 25.2512-2(b) (1954 Code (26 C.F.R.)). Only if selling price is unavailable is it appropriate to resort to "other relevant factors," which might include valuation of underlying assets. *Id.* at §§ 20.2031-2(f), 25.2512-2(f). It appears, therefore, that the computation of the Texas

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shares, and imposed a new tax on banks (cf. *Memphis Bank & Trust Co.* v. *Garner*, 624 S.W.2d 551 (1981), probable jurisdiction noted, No. 81-1613 (Apr. 26, 1982)). It retained the annual ad valorem tax on shares of loan companies, investment companies, and cemetery companies. Tenn. Code Ann. § 67-715 (1976 & Cum. Supp. 1982). Cf. *Peter Kiewit Sons' Co.* v. *County of Douglas*, 161 Neb. 93, 72 N.W.2d 415 (1955), decided prior to the 1959 amendment of 31 U.S.C. 742.

tax on bank shares does not "require that * * * the obligations [of the United Statets] * * * be considered, directly * * *." It is of course true that if a bank's holdings of government bonds were large, that fact would have a perceptible effect upon the value of a share of the bank's stock. That may ultimately support the conclusion that government bonds are considered "indirectly" in the computation of the tax, but it does not demonstrate that the language of 31 U.S.C. 742 unambiguously or explicitly bears upon the assessment of Texas bank shares at their "actual value" or "actual cash value." The tax might be computed without reference to the makeup of the bank's portfolio of securities.

We therefore deem it essential to supplement consideration of the statute's language by consideration of its background and legislative history.

A. Until 1959 States Were Permitted To Include Obligations Of The United States When Taxing Shareholders, But Not When Taxing The Corporation

This Court in *Weston* v. *Charleston*, 27 U.S. (2 Pet.) 449 (1829), held that a tax on specified forms of property held in the City of Charleston could not be imposed upon obligations of the United States, since the tax would operate upon the constitutional authority of the United States to borrow money, and would constitute "a burden on the operations of government" (*id.* at 468). That decision was followed in two cases involving New York taxes on state chartered banks. In *Bank of Commerce* v. *New York City*, 67 U.S. (2 Black) 620 (1863), the tax was upon the capital of the bank ("it is agreed the tax is upon the property constituting the capital" (*id.* at 629)); in the *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865), the tax was "on a valuation equal to the amount of their

capital stock paid in or secured to be paid in, and their surplus earnings" (*id.* at 200; emphasis omitted). In each case the Court held that the amount on which the tax was computed was required to be reduced by the value of obligations of the United States held by the bank.

In 1862, the Congress passed the first of seven statutes authorizing the Secretary of the Treasury to borrow large amounts on the credit of the United States, the first six during the course of the Civil War, and the seventh, in 1870, authorizing refunding of the existing debt.[9] In slightly variant terms, each of these statutes provided either that obligations of the United States generally, or the obligations authorized by that statute, should be exempt from taxation by state or local authority.[10] The statutory exemption was made general, and permanent, by Section 3701 of the Revised Statutes:

> [A]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Meanwhile, Congress had passed the Act of June 3, 1864, ch. 106, 13 Stat. 99 *et seq.* (the National Bank Act),[11] authorizing the incorporation of national

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[9] Act of Feb. 25, 1862, ch. 33, 12 Stat. 345; Act of Mar. 3, 1863, ch. 73, 12 Stat. 709; Act of Mar. 3, 1864, ch. 17, 13 Stat. 13; Act of June 30, 1864, ch. 172, 13 Stat. 218; Act of Jan. 28, 1865, ch. 22, 13 Stat. 425; Act of Mar. 3, 1865, ch. 77, 13 Stat. 468; Act of July 14, 1870, ch. 256, 16 Stat. 272.

[10] The statutes are listed, and the exempting provisions quoted, in *Smith* v. *Davis*, 323 U.S. 111, 117 n.7 (1944).

[11] An earlier version, embodied in the Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, was repealed by Section 62 of the National Bank Act, 13 Stat. 118, and did not contain the provisions of the later statute regarding state or local taxation.

banks and making detailed provisions for their organization, financial structure, and powers. Among other things, Section 40 of the National Bank Act (13 Stat. 111) required officers of a national bank to compile, and make available to "officers authorized to assess taxes under state authority," a list of shareholders. Section 41 (13 Stat. 111) provided that nothing therein should prevent taxation of such shares under state authority.[12]

New York thereupon passed a statute enabling state banks to become national banks, and imposing a personal property tax upon the owners of shares in national banks. In *Van Allen* v. *The Assessors*, 70 U.S. (3 Wall.) 573 (1866), a shareholder in the First National Bank in Albany, the capital of which was wholly invested in bonds of the United States, challenged the power of the State to tax his shares.

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[12] The concluding clauses of Section 41 (13 Stat. 112), later set forth with but slight changes in Rev. Stat. 5219, were as follows:

> *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further*, That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed.

The Court held that since the state had imposed no comparable tax upon state banks or their shareholders, the tax violated the second proviso of Section 41. But the Court noted that that defect could be remedied by state legislation (70 U.S. at 581), and proceeded to consider the "main and important question involved," whether the value of shares subject to tax must be reduced by the amount of the obligations of the United States held by the banks. On that question the Court was "satisfied that the States possess the power to tax the whole of the interest of the shareholder," and that it was not required that "the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares" (*id.* at 588).

Almost ninety years later the Court recognized that the pattern of decision had remained consistent. *Society for Savings* v. *Bowers*, 349 U.S. 143, 144-148 (1955). When state taxes had been imposed upon a corporation, whether with respect to its property or capital, the decisions of this Court required that obligations of the United States be eliminated from the tax base.[13] On the other hand, when the tax was upon shares owned by shareholders, then (absent discrimination[14]) there was no requirement that the taxable value of the shares be reduced by the obligations of the United States held by the corporation.

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[13] *The Banks* v. *The Mayor*, 74 U.S. (7 Wall.) 16 (1869); *Home Savings Bank* v. *Des Moines*, 205 U.S. 503 (1907); *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U.S. 516 (1914); *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Society for Savings* v. *Bowers*, *supra*.

[14] *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U.S. 113 (1935).

As the Court put it in the *Van Allen* case, *supra*, the state assessors were not required to inquire into the investments of the corporation.[15]

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[15] *People* v. *The Commissioners*, 71 U.S. (4 Wall.) 244 (1867); *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353 (1870); *Mercantile Bank* v. *New York*, 121 U.S. 138 (1887); *Cleveland Trust Co.* v. *Lander*, 184 U.S. 111 (1902); *Des Moines Bank* v. *Fairweather*, *supra*. There is a suggestion in the opinion of the court below that the power of a state to tax shares in a national bank derived from the first proviso in Section 41 of the National Bank Act (Rev. Stat. 5219), and that this was construed to apply to other corporations, specifically state banks (Pet. App. 16a-21a). That proviso, however, did little more than echo the concluding paragraph of *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436-437 (1819) (emphasis added): "This opinion does not deprive the States of any resources which they originally possessed. *It does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State.* But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Indeed, as this Court recognized in *Society for Savings* v. *Bowers*, *supra*, 349 U.S. at 147, though the doctrine that shareholders' interests might be taxed without making any deductions for government bonds held by the corporation "had its origin in cases involving national bank stock[,]" the result reflected the theory, applicable to corporations generally, "that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets * * *." If, however, the Congress should wish to give greater protection or enhanced marketability to government obligations, there is no reason to doubt its power to do so. *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232 (1952); *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21 (1939).

B. The 1959 Amendment To 31 U.S.C. 742 Was Intended To Preserve The Investment Attractiveness Of Obligations Issued By The United States

On June 8, 1959, President Eisenhower requested that Congress—in the interest of effective management of the public debt and of enhanced marketability of obligations of the United States—remove the existing 3.26% interest ceiling on savings bonds and 4.25% ceiling on Treasury bonds of maturities exceeding five years, increase the public debt limit, and approve "certain other technical proposals." The President stated that he had requested the Secretary of the Treasury to transmit legislation proposed for those purposes. 105 Cong. Rec. 10163-10164 (1959). The Secretary transmitted a proposed bill, Section 5(a) of which was ultimately enacted without change as Section 105(a) of Pub. L. No. 86-346, 73 Stat. 622, adding a second sentence to Rev. Stat. 3701. *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 76, 80 (1959) (*"House Hearings"*).

The Secretary appeared before the Ways and Means Committee on June 10, 1959, and—after extended testimony and a Supplemental Statement on the public debt, interest rates, and the competition for investment funds in the capital markets (*id.* at 2-66) —submitted a written statement with respect to proposed Section 5. The statement (*id.* 69-72) informed the Committee that the State of Idaho was requiring, for purposes of its individual income tax, that interest on obligations of the United States be included in gross income. It attempted to justify this by arguing that its tax was not on exempt income, but " 'upon every individual * * * measured by his net income.' "

The Treasury and the Department of Justice thought the distinction "without substance," but concluded that "the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local income taxes. The proposed provision would accomplish that purpose." *Id.* at 71. The statement on proposed Section 5 concluded (*id.* at 72):

> In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general.

On August 25, 1959, the President renewed his request for prompt action by Congress. 105 Cong. Rec. 17033-17034 (1959). The Report of the House Ways and Means Committee on the bill stated that "the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes." After referring to the position of "one State," it added that "[t]he new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes [*sic*] and except estate taxes or inheritance taxes." H.R. Rep. No. 1148, 86th Cong.,

1st Sess. 2, 8, 12 (1959). The Report of the Senate Finance Committee repeated these statements. S. Rep. No. 909, 86th Cong., 1st Sess. (1959).

There was extended floor debate on the bill in both House [16] and Senate,[17] principally regarding the ceilings on interest rates. Only brief mention was made of the exemption for government bonds in the introductory summaries of Chairman Mills of the House Ways and Means Committee [18] and of Chairman Byrd of the Senate Finance Committee.[19] Public Law 86-346 was approved on September 22, 1959, and added the second sentence to 31 U.S.C. 742. 73 Stat. 621, 622.

C. The 1959 Amendment Exempts Bank Shares From State Taxes Insofar As Their Value Is Enhanced By Federal Obligations Held By The Banks

The legislative history of the 1959 amendment to Section 742 did not explicitly state that the amended statute was designed to overturn a consistent line of decisions that had had its origin almost a hundred years earlier, or to produce any specific result other than frustrating Idaho's attempt to subject the interest on government bonds to its personal income tax.[20] A reluctance to accept any broader purpose

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[16] 105 Cong. Rec. 18154-18157, 18157-18174, 18842, 19377-19383 (1959).

[17] 105 Cong. Rec. 18380, 18477-18484, 18510-18541, 18542-18545, 18549-18556, 18556-18564, 18710, 19260-19267 (1959).

[18] 105 Cong. Rec. 18157 (1959).

[19] 105 Cong. Rec. 18479 (1959).

[20] Legislation was hardly required for that purpose. The prospect of sustaining Idaho's position in litigation could hardly have been regarded as promising. *Miller* v. *Milwaukee*,

seems to have influenced the decisions of the Texas Court of Appeals (Pet. App. 23a), and the Supreme Court of Georgia in *Bartow County Bank*, *supra*, 285 S.E.2d at 927. But "the plain language of the statute, its origin, and its purpose" [21] were there to be perceived. This Court had earlier noted "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith* v. *Davis*, *supra*, 323 U.S. at 117. While the Congress did not grant all of the flexibility in interest rates and enhanced marketability that the President and the Secretary sought, the committee reports endorsing Section 105(a) of the amendment gave notice that barriers to marketability in many forms of state taxation were to be removed.

The amendment Congress enacted states: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes" (31 U.S.C. 742). Two aspects of the amendment denote the scope of its operation. First, the sweeping quality of its language is inconsistent with implicit or implied exceptions.[22]

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272 U.S. 713 (1927); *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U.S. 136 (1927); *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, *supra*, 338 U.S. at 675-676.

[21] *National Muffler Dealers Association* v. *United States*, 440 U.S. 472, 477 (1979).

[22] Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

Second, the explicit statement of exceptions demonstrates an awareness that, but for that enumeration, the amendment would have overturned some results made long familiar by the decisions of this Court.[23] State franchise taxes on corporations, measured either by property of the corporation or by its net income, have consistently been permitted to include in their taxable measure obligations of the United States or the interest on such obligations.[24] Similarly, state inheritance taxes have long been imposed upon a bequest of federal government bonds.[25] In each case the value of the bonds, or the income therefrom, would necessarily be considered in the computation of the tax. The exceptions make it clear, therefore, that the draftsmen of the 1959 amendment were fully aware that in areas not excepted the new statute would substantially expand the exemption of obligations of the United States from state taxation.

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[23] Cf. *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

[24] *Society for Savings* v. *Coite*, 73 U.S. (6 Wall.) 594 (1868); *Provident Institution* v. *Massachusetts*, 73 U.S. (6 Wall.) 611 (1868); *Hamilton Co.* v. *Massachusetts*, 73 U.S. (6 Wall.) 632 (1868); *Home Insurance Co.* v. *New York*, 134 U.S. 594 (1890); *Educational Films Corp.* v. *Ward*, 282 U.S. 379 (1931); *Werner Co.* v. *Director of Taxation*, 350 U.S. 492 (1956). *Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929), once thought to cast doubt upon earlier decisions, has been said by this Court to be without precedential value. *Phillips Co.* v. *Dumas School District*, 361 U.S. 376, 382 (1960); *United States* v. *City of Detroit*, 355 U.S. 466, 472 n.2 (1958). For a federal tax on doing business in corporate form measured by net income that includes interest on municipal bonds, see *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911).

[25] *Plummer* v. *Coler*, 178 U.S. 115 (1900); cf. *Orr* v. *Gilman*, 183 U.S. 278 (1902); *Greiner* v. *Lewellyn*, 258 U.S. 384 (1922).

We may note a few changes in earlier accepted results that the plain language of the amendment appears to make. Gift taxes on gifts of tax-exempt bonds have been upheld on the same reasoning that has supported the application of estate and inheritance taxes—that the tax is not "on" the exempt bond, but on the transfer.[26] But the bonds must obviously be considered in the computation of the gift tax, and gift taxes are not excepted from the operation of the amended statute. Presumably, therefore, state gift taxes cannot be applied to gifts of government bonds made after 1959. Similarly, this Court has held that gain on the sale of municipal bonds is subject to the federal income tax,[27] and by a parity of reasoning, a state before 1959 could presumably have imposed its income tax on gains from the sale of bonds of the United States. That is no longer possible if, as seems likely, the bonds must be considered directly or indirectly in the computation of the tax.

Indeed, the decision of the Supreme Court of Rhode Island in *Federal Products Corp.* v. *Norberg*, *supra*, 429 A.2d at 448, well illustrates the sweep of the amendment. Rhode Island has an unobjectionable tax on corporate net income that does not include interest on obligations of the United States. But for corporations doing business in other states as well as in Rhode Island, the State employs an allocation formula to determine the part of the corporation's net income subject to its tax. One factor in the formula is gross income realized in Rhode Island compared to overall

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[26] Cf. *Hamersley* v. *United States*, 16 F. Supp. 768 (Ct. Cl. 1936), cert. denied, 300 U.S. 659 (1937); *Phipps* v. *Commissioner*, 91 F.2d 627 (10th Cir.), cert. denied, 302 U.S. 742 (1937). Cf. *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929).

[27] *Willcuts* v. *Bunn*, 282 U.S. 216 (1931).

gross income, and for allocation purposes, the interest on government bonds is included in gross income. The plain language of Section 742 now appears to prohibit consideration of the interest from government bonds in the computation of the tax, and the Supreme Court of Rhode Island so held.

These examples, and others that could be suggested, demonstrate that the plain language of the amended Section 742 appears to broaden substantially the pre-existing exemption of obligations of the United States from state and local taxation. Nothing in the committee reports endorsing that language is inconsistent with this expanded exemption. The question in this case is whether the amended statute has legislatively overturned the decisions that concededly would have upheld the Texas statute prior to 1959.

We noted above, pages 8-9, that since the Texas statute requires bank shareholders to report the "actual value" of their shares, and the tax to be computed on the "actual cash value" of the shares, Section 742 does not apply unambiguously. The value of government bonds held by the bank was not necessarily considered, at least "directly," in the computation of the tax. We cannot, however, stop there. The Georgia tax on bank shares considered in *Bartow County Bank*, *supra*, provided that such shares should be "taxed at their fair market value," but then proceeded, "which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, * * *" (285 S.E.2d at 922). And in this case, despite the statutory provision for assessment of the tax on the basis of "actual cash value" of shares, the record demonstrates that the tax was in practice assessed upon "the capital accounts of the bank, subtracting therefrom the assessed value of

real estate and dividing by the number of shares" (Pet. App. 48a; see also *id.* at 15a). This tax, like that imposed by the Georgia statute, is inconsistent with Section 742. Since the obligations of the United States held by the banks in this case were "considered" in the computation of the taxes assessed—if not "directly," certainly at least "indirectly"—the taxes violated the enhanced exemption granted to obligations of the United States, by Section 742.

Moreover, even if the assessments had been based upon "actual cash value," as the Texas statute directed, we believe that they are inconsistent with Section 742 so long as they are not reduced by the amount of government bonds held by the banks. It is unlikely that Congress intended to distinguish between a statute like Georgia's and a statute like Texas's. While the "actual cash value" of shares may refer to selling price rather than underlying assets, it is still true that if substantial underlying assets were removed, the selling price of the shares would be reduced. We therefore conclude that Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960) is invalid, because it would require that obligations of the United States held by a bank "be considered * * * in the computation of the tax," at least "indirectly," if not "directly." Cf. *McWilliams* v. *Commissioner*, 331 U.S. 694, 702-703 (1947).

The court below reached a contrary conclusion, relying primarily upon the phrase "Except as otherwise provided by law"—which it erroneously thought introduced Rev. Stat. 3701 (see note 6, *supra*)—and upon its understanding of the function of 12 U.S.C. 548 (Rev. Stat. 5219) (Pet. App. 14a-22a). The court also (Pet. App. 23a) attributed a very limited scope to the 1959 amendment. The court was mistaken as to each of the grounds upon which it relied.

First, while the phrase "Except as otherwise provided by law" does introduce the unenacted 31 U.S.C. 742, it has never been a part of Section 3701 of the Revised Statutes, before or after 1959. As this Court pointed out in *Stephan* v. *United States*, 319 U.S. 423, 426 (1943), "the Code cannot prevail over the Statutes at Large when the two are inconsistent." See also *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379-380 (1958); *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964).[28]

Second, there was no reason to assume that the taxation of a bank's shares (as distinguished from taxation of national banks themselves, see *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339 (1968)) was conditioned upon 12 U.S.C. 548 (Rev. Stat. 5219), since *M'Culloch* v. *Maryland*, *supra*, had long since established that they were subject to state taxes. In any event, as indicated in *Society for Savings* v.

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[28] Even if the introductory clause of 31 U.S.C. 742 had official status, there is no reason to believe that it refers to Rev. Stat. 5219, as the court below assumed. In 1926, when the Code was published, Rev. Stat. 3701 and 5219 had coexisted for approximately 50 years without cross-reference. Rather, the indications are that the cross-reference inserted by the draftsmen of the Code was to the Act of Aug. 13, 1894, ch. 281, 28 Stat. 278, which had legislatively overruled *Bank* v. *Supervisors*, 74 U.S. (7 Wall.) 26 (1869), and modified Rev. Stat. 3701 to the extent of removing the exemption from circulating notes of national banks, United States legal tender notes, and other notes circulating as currency. See W. McClenon & W. Gilbert, *Index to the Federal Statutes, 1874-1931* 1243 (1933), listing the Act of Aug. 13, 1894, as an implied amendment of Rev. Stat. 3701. Messrs. McClenon and Gilbert were with the Library of Congress's Legislative Reference Service, and in the preface to the 1926 edition of the Code (at v), "[a]cknowledgement of valuable assistance is given to W.H. McClenon * * *."

Bowers, *supra*, 349 U.S. at 147, although a tax on the full value of shares was first approved by this Court in cases involving national bank shares, the decision reflected the fact that a shareholder's interest in a corporation was a separate property interest, whether the corporation was a national bank, a state bank, or other type of corporation.

Finally, there was no reason for the court below to find that the 1959 amendment did not apply to bank shares (Pet. App. 23a). The amendment contained its stated exceptions, and there was no justification for the court's addition of unstated exceptions. *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

II. THE TEXAS STATUTE DOES NOT DISCRIMINATE AGAINST OBLIGATIONS OF THE UNITED STATES

Petitioners also assert that the Texas law discriminates against obligations of the United States, since the value of shares subject to tax is reduced by the assessed value of a bank's real estate, but not by the value of obligations of the United States (Pet. 14-16). The court below properly rejected that claim (Pet. App. 28a).

This is not a case, so far as the record discloses, like *Memphis Bank & Trust Co.* v. *Garner*, *supra*, where obligations of the taxing jurisdiction, or interest thereon, were excluded from the tax base but obligations of the United States, or interest thereon, were not. In this case, a bank's real estate was taxed to the bank pursuant to the same statute (Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960)) that taxed bank shares (less the assessed value of the real estate) to the shareholders.[29] On the face of it, there

[29] This statutory pattern, presumably reflecting the closing statements in this Court's opinion in *M'Culloch* v. *Maryland*,

is no discrimination, and assuming equal tax rates, a shift of investment funds by the bank would result in no change in the aggregate tax burden.

In any event, a bank's real estate is in an entirely separate category of use and investment from its holdings of government bonds. We do not condone any discrimination against obligations of the United States, but it must be a meaningful discrimination, rather than an abstract differentiation, if it is to be held objectionable. Cf. *Mercantile Bank* v. *New York, supra*; *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373 (1913); *Michigan National Bank* v. *Michigan*, 365 U.S. 467 (1961).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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SEPTEMBER 1982

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supra, note 15, and carried forward in the National Bank Act, *supra*, note 12, has long been familiar. See, *e.g.*, *Van Allen* v. *The Assessors, supra*, 70 U.S. (3 Wall.) at 577; *Des Moines Bank* v. *Fairweather, supra*, 263 U.S. at 108-109.

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On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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---

1. We will address the issues in Part I of the United States's brief in a brief on the merits if the petition is granted.

2. Part II of the Brief for the United States (pp. 23-24) concerns petitioners' separate and alternative claim that this tax discriminates against United States obligations. As we read Part II, it views the discrimination of this tax against United States obligations as being abstract and not meaningful. Petitioners' contention of discrimination is based on the holding of *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935), in which this Court held that to include United States securities in the calculation of a share tax measured by only part of the net assets "seems inevitably to increase the burden of the tax by reason of their ownership," 296 U.S. at 120, and violates the Borrowing Clause of the Constitution. The bank share tax assessed by respondents discriminates against United States obligations in the same way the tax in the *Schuylkill Trust Co.* decision discriminated against those obligations. See Petition, p. 15.

The *Schuylkill Trust Co.* case has been followed in state-court decisions (Pet. p. 15) with which the interpretation of the court below (Pet. App. p. 28a) is in conflict.

The Solicitor General recommends denial of the writ as to question 2, apparently based on a perception that the discrimination condemned by *Schuylkill Trust Co.* is no longer meaningful. But that decision remains the law as announced by this Court, and any issue as to its vitality should be considered and determined by this Court on the merits.

The Court should grant the petition for a writ of certiorari as to both questions presented, and not limit the grant to question 1.

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RESPONDENTS' REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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RESPONDENTS' REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Part I of the Brief of the United States is addressed herein.[1]

The Brief of the United States (pp. 8-23) is in agreement with Respondents' position that the Texas tax on bank shares does not "require that . . . the obligations [of the United States] . . . be considered, directly . . .".

The question is raised, however, as to whether or not the tax is an indirect tax on government securities.

[1]Part II of the Brief of the United States is not addressed herein. Respondents have replied to Petitioners' reply to Part II of the Brief of the United States in a separate brief filed of even date herewith.

1. A TAX ON CORPORATE STOCK IS NOT AN INDIRECT TAX ON THE CORPORATION'S ASSETS.

31 U.S.C. §742 exempts all stock, bonds, treasury notes and other obligations of the United States from taxation by states or local authority where the taxation would require that either the obligations or interest thereon be considered, directly or indirectly, in the computation of the tax.[2] It is clear that 31 U.S.C. §742, if it is applicable to bank shares, would be equally applicable to other corporate stocks. Although most other intangible personal property is exempt from taxation in Texas, a number of other states tax either bank stock or stocks of other corporations, or both.[3] If the value of the federal securities owned by the corporation must be subtracted from the value of the stock owned by the stockholders, then a substantial amount of the tax values theretofore available to state and local governments was taken away without even a hint in the congressional history that it was being done. If that is the effect of the legislation, then 12 U.S.C. §548 was nullified without even a mention of it in the record.

---

[2]The Texas statutes involved in this case have been repealed. Art. 7166 of Tex.Rev.Civ.Stat.Ann. (Vernon 1960) and Tex.Rev.Civ. Stat.Ann. Art. 7150.6 (Vernon Cum.Supp.1981) have now been repealed and replaced by similar provisions in the new State Property Tax Code, Art. 11.02.

[3]Alabama, Ala. Code §40-14-70; Alaska, Alaska Stat. §29.53.010; Arizona, Ariz. Rev. Stat. §42-271; Connecticut, Conn.Gen.Stat. §12-71; Florida, Fla. Stat. §199.032; Georgia, Ga. Code §91A-3103; Illinois, Ill. Rev.Stat. ch. 120 ¶499; Indiana, I.C. 6-5-6-2; Iowa, Iowa Code §427.13; Kansas, K.S.A. 79-1103; Kentucky, KY. Rev.Stat. §132.190; Louisiana, La.Rev.Stat.Ann. §1951; Michigan, Mich.Stat. Ann. §7.556(2); Minnesota, Minn.Stat. §272.01; Nevada, Nev.Rev. Stat. §361.235; New Hampshire, New Hampshire Rev.Stat. ch. 84, §1; North Carolina, N.C. Gen.Stat. §105-203; Ohio, Ohio Rev.Code Ann. §5709.02; Pennsylvania, Pa.Stat.Ann. Title 72 §4821; South Dakota, S.D. Compiled Laws Ann. §10-16-9; Tennessee, Tenn.Code Ann. §67-401; 67-751; West Virginia, W.Va. Code §11-5-1.

The Texas bank share tax is on the "actual value" or "actual cash value" of the bank shares less the value of the real estate taxed separately. If the federal securities are not "considered" "indirectly" in arriving at the value of the corporate stock, then, the brief of the United States would seem to agree that 31 U.S.C. §742 would not prohibit a tax on such corporate stock.

A. THE 1959 AMENDMENT TO 31 U.S.C. §742 DID NOT CHANGE THE CHARACTER OF EITHER THE STOCKHOLDER'S PROPERTY OR THE CORPORATION'S PROPERTY.

The law has been clear since *Van Allen v. The Assessors*, 70 U.S. (3 Wall) 573 (1886), that state assessors were not required to inquire into the investments of the corporation. The 1959 amendment does not purport to change that decision nor those that came after it. Since *Van Allen*, supra, a tax upon owners of shares of stock in a corporation has not been a tax on United States obligations owned by the corporation. This rule which was affirmed in *Home Savings Bank v. Des Moines*, 205 U.S. 503 (1907), and reaffirmed in *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143 (1955), was codified as R.S. 5201 (12 U.S.C. §548).

B. THE 1959 AMENDMENT TO 31 U.S.C. §742 WAS TO CLARIFY THAT STATES COULD NOT TAX THE INCOME FROM UNITED STATES OBLIGATIONS.

The Honorable Robert B. Anderson, Secretary of the Treasury, made it very clear why Section 5 of the bill to amend Section 3701 of the Revised Statutes (31 U.S.C. §742) was needed "to clarify the exemption it accords to the interest on obligations of the United States from state and

local income taxes" in his appearance before the Committee on Ways and Means of the House of Representatives on June 10, 1959.[4] The Secretary made it clear that the amendment was necessary for the single purpose of stopping Idaho from taxing the income from such securities. Because of the importance of the intent of the amendments, we believe his comments on Section 5 of the bill are in order where Secretary Anderson said:

> Section 5 of the bill would amend section 2701 of the Revised Statutes (31 U.S.C. 742) to clarify the exemption it accords to the interest on obligations of the United States from State and local income taxes.
>
> Section 3701 of the Revised Statutes provides that obligations of the United States shall be exempt from taxation by or under State or local authority. The Supreme Court of the United States has held that this provision also exempts the interest on obligations of the United States from Taxation by or under State or local authority *N.J. Realty Title Ins. Co. v Div. of Tax Appeals* (1950), 338 U.S. 665.
>
> In recent years the State of Idaho has taken the position that its income tax law enacted in 1933 has required the inclusion of interest on obligations of the United States in computing gross income (from which taxable net income was determined), and that the Federal statutes have not precluded this requirement. The Idaho statute provided that there shall be levied "upon every individual . . . a tax which shall be according to and measured by his net income." The term "gross income" (from which taxable net income was determined) was defined to include, among other items, "all interest received from federal, state, municipal or other bonds." The law elsewhere provided, however, that "all income,

[4]Hearings before the Committee on Ways and Means of the House of Representatives, Eighty-Sixth Congress, First Session, June 10, 11, and 12, 1959.

except . . . income not permitted to be taxed under . . . the constitution or laws of the United States, shall be included and considered in determining net income of taxpayers."

It has apparently been the position of the State of Idaho not that the Federal Government is without power to exempt the interest on its obligations from State income taxes, but rather that it has not exempted that interest from a tax such as the Idaho tax.

The reasoning of the Idaho authorities appears to have been as follows: The Federal statute has exempted the interest on Federal obligations from State taxation, and the State tax statute excluded income not permitted to be taxed by the Federal exempting statute, but the Idaho statute did not attempt to tax this income. Rather it carefully provided that there should be levied "upon every individual. . .a tax. . .measured by his net income." Apparently their position has been that this has a different effect from the State statute before 1933, which provided that there should be levied "upon the net income of every individual . . . a tax," which was therefore a tax not permitted under the Federal exempting statute.

The Treasury and the Department of Justice have felt that the position of the State of Idaho rests upon a distinction of words which is without substance. We have not, however, been able to persuade the Idaho authorities to change their position. Since this position does not rest upon a theory of lack of Congressional power to exempt interest on Federal obligations from a tax such as Idaho has had, but rather upon the theory that Congress has not exercised its power, the Treasury and the Department of Justice believe that the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local income taxes. The proposed provision would accomplish that purpose.

> It should be mentioned that on March 20, 1959, the State of Idaho adopted a new income tax law. The new law declares it to be its intent to impose a tax identical as far as possible to the income tax imposed by the Federal Internal Revenue Code. Since the Federal Internal Revenue Code imposes a tax "on the taxable income of every individual" it has been suggested that Idaho may no longer attempt to maintain its position that the Federal exemption statute does not extend to its income tax. We have communicated with responsible State authorities, however, and have been unable to obtain assurances that the State will discontinue requiring the inclusion of interest on obligations of the United States in computing State income taxes.
>
> In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general.

It is clear from the testimony of Secretary Anderson that in proposing the amendment, he had no intent to expand the exemptions into other areas as suggested by the Brief of the United States.

Chairman Mills described the amendment to the House of Representatives as "a reaffirmation of the exemption from certain local taxes on Federal Bonds." Congressional Record — House, 1959, p. 18157.

CONCLUSION

There is no basis for granting a writ of certiorari. The legislative history of the 1959 amendment shows that it was only to "clarify" already existing exemptions and did not create new exemptions that would amend other acts of Congress and nullify multiple decisions of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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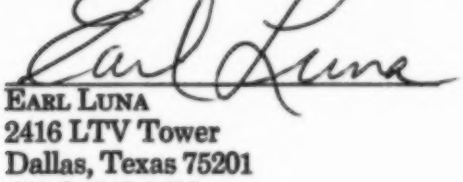

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RESPONDENTS' REPLY TO PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioners' Reply to Brief for the United States as Amicus Curiae claims the Texas bank share tax discriminates against United States obligations based on the holding of *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935). As pointed out in said Brief of the United States (pp. 23-24), there is no meaningful discrimination against United States obligations. Petitioners' interpretation of *Schuylkill* (1935), supra, is not in accord with the interpretation of this Court, where this Court later said:

> "We held further that the exclusions from the base of a proportion of the value of *tax-exempt* shares of Pennsylvania corporations, and the refusal of like treatment

of federal securities, operated as an unconstitutional discrimination against the latter." *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506, 510 (1938) (emphasis added).

Questions of State law were involved that led to the 1935 *Schuylkill* decision. Those facts are not involved in this case. The Petitioners also overlook the fact that when this Court considered *Schuylkill* in 1938, it was held that a tax on the shares of the Trust Company was not a tax on the assets of the company.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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RESPONDENTS', THE CITY OF DALLAS, MAX NOLLER, DALLAS INDEPENDENT SCHOOL DISTRICT AND THE BOARD OF EQUALIZATION OF THE CITY OF DALLAS AND DALLAS INDEPENDENT SCHOOL DISTRICT, REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUMMARY OF THE ARGUMENT

1.) The Brief for the United States as Amicus Curiae, fails to recognize the significance of 12 U.S.C. §548 (1969), and its roll in the taxation of bank shares under Tex.Rev. Civ.Stat.Ann. art. 7166 (Vernon's 1960). This brief will discuss the effect of 12 U.S.C. §548 on the taxation of bank shares in the state of Texas under Tex.Rev.Civ.Stat.Ann. art. 7166 (Vernon's 1960).

2.) These Respondents do not contest the conclusions reached in Part II of the United States's brief.

ARGUMENT

I.

SECTION 548 MUST BE CONSIDERED WHEN DETERMINING THE VALIDITY OF TEX.REV.CIV. STAT.ANN. ART. 7166 (VERNON'S 1960).

The Brief for the United States correctly characterizes the pivotal issue in this case as being, "[w]hether the amended statute [31 U.S.C. § 742] has legislatively overturned the decisions that concededly would have upheld the Texas statute prior to 1959", (Brief for the United States as Amicus Curiae at 20); however, in its argument it has failed to recognize that the decisions which uphold the Texas statute are founded on the construction of 12 U.S.C. §548 and its predecessors.

A. 12 U.S.C. §548, NOT 31 U.S.C. §742, CONTROLS THE TAXATION OF BANK SHARES.

Section 548 deals specifically with the taxation of bank shares. In the National Bank Act, (Act of June 3, 1864 ch. 106 §41; 13 Stat. 99 *et seq.*), Congress expressly consented to local taxation of national bank shares. Each subsequent version of that Act has authorized the same taxation of bank shares. Relying upon the National Bank Act and its successors, the Supreme Court has held that the tax on bank shares does not require the exclusion of federal obligations. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866); *Mercantile Bank v. New York*, 121 U.S. 138 (1884); *Cleveland Trust v. Lander*, 184 U.S. 111 (1902).

The 1959 amendment of 31 U.S.C. §742 cannot be interpreted to control another, more specific, federal statute. Section 742 is a general exemption statute which reiterates the rule from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)

316 (1819), that states cannot tax or otherwise burden the powers of the federal government. The Supreme Court has recognized this federal sovereignty, with or without a Congressional mandate. "Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress." *Home Savings Bank v. Des Moines*, 205 U.S. 901, 908 (1906). The reference to an "indirect" tax in the 1959 amendment of 31 U.S.C. §742 could not broaden these constitutional rights.

By enacting the National Bank Act, supra, Congress withdrew its immunity in regard to the taxation of national bank shares. This Act allowed states to tax bank shares without any exclusion or limitation. Had Congress intended to somehow restrict or limit the rights of taxation it gave to the states, it would have done so in section 548 itself, not section 742. *Van Allen v. The Assessors, supra.*

The Brief for the United States fails to recognize the fact that through 12 U.S.C. §548 and its predecessors, Congress has granted permission for the local taxation of bank shares and therefore has relinquished its right to any exemptions not specifically reserved in that Act itself.

Section 742 can only apply in those cases where Congress has retained all or a portion of its sovereignty. It does not control here.

Under section 548, Congress has expressly removed bank shares from the scope of the section 742 exemption. Throughout the history of section 548, various legislative restrictions have been imposed upon the powers of local authorities to tax bank shares. No such restriction has been directed toward the inclusion of United States obligations in the computation of the tax.

In 1969, Congress affirmed the type of taxation which is the subject of this case. The 1969 amendment to 12 U.S.C. §548, broadened the taxing authority of the states in regard to national banks. The comments of the Senate Banking and Currency Committee, S. Rep. No. 91-530 91st Cong. 1st Sess. 1969, [1969] U.S. Code Cong. and Ad. News 1594 *et seq.* made clear that changes included in the amendment were not ". . . a prohibition against the continued imposition of any tax under the authority of Section 5219 of the Revised Statute as it now reads." There is no indication that Congress intended to alter the method of the imposition of the share tax. From these comments, it can be presumed that Congress was familiar with the law and its precedents and intended its amendment to conform with them. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Regardless of the existence of 31 U.S.C. §742 as amended in 1959, Congress has authorized the inclusion of federal obligations in a bank share tax by virtue of the continued existence of 12 U.S.C. §548. Congress had both statutes before it in 1959 when it amended 31 U.S.C. §742. Congress was aware the Court's construction of 12 U.S.C. §548, yet it did not amend that statute until ten years later and to this date has not placed any restriction on its consent to the taxation of bank shares under 12 U.S.C. §548.

B. THE 1959 AMENDMENT TO 31 U.S.C. §742 DOES NOT REPEAL OR CONTROL 12 U.S.C. §548 AS CONSTRUED BY THE SUPREME COURT.

This case does not involve the overturning of prior judicial decisions by legislative enactment. It involves an attempt to overturn an express and specific federal statute by a general statute.

While section 742 is a general statute, exempting United States obligations from state taxation, section 548 is a specific provision expressly authorizing the taxation of bank shares. Where there is no clear intent otherwise, a specific statute will not be controlled or nullified by a general one. *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961).

This situation is similar to that encountered by this Court in *Rogers C. B. Morton v. C. R. Mancari*, 417 U.S. 535 (1974). In that case, the Court determined that the Indian preference provisions of the Indian Reorganization Act of 1934 (25 U.S.C. §472) are not repealed by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e-16(a)), because the Indian preference statute is a specific provision applying to Indians, whereas the Equal Employment Opportunity Act is a general act applying to a broad spectrum of situations. In the case presently before this Court, 12 U.S.C. §548 and its predecessors specifically apply to the taxation of bank shares, while 31 U.S.C. §742 is a general exemption statute. Clearly, 12 U.S.C. §548 should not be controlled or nullified by 31 U.S.C. §742.

These two statutes have been construed without conflict since the 1880's. Without express Congressional intent to the contrary, they should continue to be construed in harmony.

CONCLUSION

The petition for writ of certiorari should be denied as to both questions presented.

Respectfully submitted,

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October, 1982

Respondent's Reply Brief

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No. 81-1717

In The

Supreme Court of the United States

October Term, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

vs.

DALLAS COUNTY, ET. AL.,
Respondents.

OBJECTIONS OF RESPONDENTS TO MOTIONS OF DALE NATIONAL BANK AND AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE FILED BY RESPONDENTS DALLAS COUNTY, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

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In The

Supreme Court of the United States

October Term, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

vs.

DALLAS COUNTY, ET. AL.,
Respondents.

On Petition for a Writ of Certiorari To the Court of Appeals for the Fifth Supreme Judicial District of Texas in Dallas

OBJECTIONS OF RESPONDENTS TO MOTIONS OF DALE NATIONAL BANK AND AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Respondents Dallas County, Texas, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County and Its Members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District, and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, respectfully object to the Motions for Leave to File Briefs as Amicus Curiae of Dale National Bank and the American Bankers Association for the following reasons:

1.

As stated in Rule 36 of the Rules of the Supreme Court, amicus briefs at this stage of proceedings are not favored. These Respondents did not consent to the filing of same. Because of Rule 36, these Respondents did not encourage the filing of amicus briefs in support of their position. Since these amicus briefs in support of Petitioners were filed after the brief of Respondents was already prepared and printed, it was too late to answer the points raised therein, and it would be unfair to Respondents to allow same to be filed.

2.

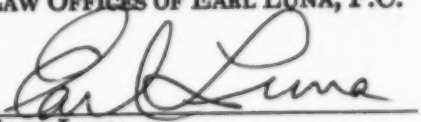
In each of the amicus briefs, a point is raised which was not raised in the Petition for Writ of Certiorari, but which *was* raised and briefed by Petitioners in the lower courts. Since those points were not raised in *this* Court, it was not necessary for Respondents to answer them. Now, however, the points are raised and argued and Respondents have no opportunity to answer them. It would be fundamentally unfair for Respondents to be deprived of their right to answer all of the arguments on which Petitioners rely. For this reason, Respondents strenuously object to the filing of such amicus briefs. As this Court has said about another rule of civil procedure, Rule 36, ". . . was written to further, not defeat the ends of justice." *Surowitz v. Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966). To permit the filing of these amicus briefs would be extremely unjust to the Respondents.

3.

In the event that the Court permits these amicus briefs to be filed, fairness demands that Respondents be given an opportunity to answer the points raised therein.

Wherefore, premises considered, Respondents respectfully pray that the motions of Dale National Bank and the American Bankers Association for leave to file briefs as amicus curiae be denied. In the alternative, if said amicus curiae briefs are permitted to be filed, Respondents should be permitted to answer same within a reasonable time.

Respectfully submitted,
LAW OFFICES OF EARL LUNA, P.C.



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PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated:

I, Earl Luna, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Respondents, Dallas County, et al., in all proceedings had in the Courts below.

I further state upon oath that on the 7th day of May, 1982, I served copies of the foregoing Objections to Motion for Leave to File Brief as Amicus Curiae on Petitioners by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit:

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SUBSCRIBED and SWORN TO before me by the said Earl Luna on this the 7th day of May, 1982.

Notary Public
Dallas County, Texas

Petitioner's Brief

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ALEXANDER L. STEVAS,
CLERK

No. 81-1717

IN THE

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OCTOBER TERM, 1982

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Petitioners,

v.

DALLAS COUNTY, et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF FOR PETITIONERS

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December 16, 1982

QUESTION PRESENTED

Whether the Texas property tax on a bank's shares violates United States Revised Statute 3701 (31 U.S.C. § 742) when the taxable value of the shares is determined by the bank's net assets without any deduction for tax-exempt United States obligations owned by the bank?

LISTING OF PARTIES

Petitioners

All of the following petitioner banking corporations or national banking associations are located in Dallas County, Texas, except for Canyon Creek National Bank which is located in Collin County, Texas. The names in parentheses are the present names of banks which have changed the name under which they do business since commencement of the actions herein.

American Bank and Trust Company (InterFirst Bank Oak Cliff)
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Company
Citizens National Bank of Dallas (Cullen/Frost Bank of Dallas, N.A.)
Dallas International Bank
Dallas National Bank (RepublicBank Dallas East, N.A.)
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank (Allied Bank – Southwest)
First National Bank in Dallas (InterFirst Bank Dallas, N.A.)
First National Bank in Garland (RepublicBank Garland, N.A.)
First National Bank of Lancaster
First Security Bank of Dallas, N.A. (First City Bank – Market Center, N.A.)
First Security Bank of Garland, N.A. (First City Bank of Garland, N.A.)
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank (Grand Bank)
Greenville Avenue Bank and Trust (RepublicBank Greenville Avenue)
Grove State Bank (InterFirst Bank Pleasant Grove)
Inwood National Bank of Dallas
Lakewood Bank and Trust Company (Allied Lakewood Bank)
Love Field National Bank
Mercantile National Bank at Dallas

Metro Bank of Dallas
(Allied Bank of Dallas)
National Bank of Commerce
of Dallas (BancTexas
Dallas N.A.)
North Dallas Bank & Trust Co.
NorthPark National Bank
of Dallas
Oak Cliff Bank and Trust
Company
(RepublicBank Oak Cliff)
Pan American National Bank
of Dallas
Park Cities Bank
(InterFirst Bank Park Cities)
Preston State Bank
Prestonwood National Bank
(Texas American Bank/
Prestonwood, N.A.)
Republic National Bank
of Dallas
(RepublicBank Dallas, N.A.)
Reunion Bank
Texas American Bank,
Dallas North
Texas Commerce Bank –
Campbell Centre, N.A.
Texas Commerce Bank –
Casa Linda, N.A.
Texas Commerce Bank –
Dallas, N.A.
Texas Commerce Bank –
Garland
Texas Commerce Bank –
Northwest, N.A.
Texas Commerce Bank –
Park Central, N.A.
Texas Commerce Bank –
Preston Royal, N.A.
Trinity National Bank of
Dallas
Valley View Bank
(First City Bank –
Valley View)
White Rock Bank of Dallas
(BancTexas White Rock)
Wynnewood Bank & Trust

The following class representatives are petitioners on behalf of the class of all shareholders of the above listed banks as of January 1, 1980:

Richard M. Hart
Frank Marshall
Ronald G. Steinhart
Peyton Cooper
Charles N. Brewer
Lynn D. Turner
A. A. Walker
Woodrow Brownlee

The following petitioners are the shareholders of Bank of Texas or Wynnewood Bank & Trust as of January 1, 1979:

Horace Ainsworth
Carol Sanger
Alexander
Howard A.
Alexander
Rebecca Alexander
Thomas H.
Alexander

Thomas W. and Janice B. Alexander
Peggy J. Allen
Brandon Andreason
Keri E. Andreason
Richard D. Andreason
Tara M. Andreason
Ann Dalton Foundation
W. T. and Thelma Olive Anthony
Mike Aranson
Mr. and Mrs. Angelo Athas
George T. Aubin
Austin National Bank
John and Mary Baker
Lee S. Bane
William D. Barrett
Martin Balk
Dean M. Baucum
Imogene Bennett
A. H. Bickle
James E. Biggs
Jeffery Ray Bishop
Charles C. Blaylock
Lloyd D. Blaylock
Louis Blaylock, Jr.
Lee Blocker
James T. Boggs
Hester Lynn Bond
John Russell Bond, Jr.
Norman A. Boyd, Jr.
Bracewell & Patterson & Co.
Brooks Bradford
Thelma Balcom Bradley
Buell D. Braswell
Rosalie V. Braswell
Una Williams Brazelton
David G. Brewer, II
Sandra L. Brewer
L. D. Brinkman
E. B. Brooks, Jr.
Alton Watson Bryant
Barbara Mae Bryant
Maggie Burnett
Scott Campbell
Ross Cangelose
Sam T. Cangelose
Pat Carbone
Peggy Carpenter
R. D. Carpenter
Elizabeth Sue Cash
Peter S. Chantilis
M. D. Chapman
Charter Investment Co.
Jack Chewning, Sr.
J.E.R. Chilton, III
Carter B. Christie
Charles S. Christopher
Frederica Cobb
James L. Cody
Hardie C. Cole
Communities Foundation of Texas, Inc.
David P. Copeland, Jr.
Albert R. Cox
Maurine P. Craft
Rhea F. Crane
Avis Davis
Dr. William B. Dean
Granville M. Deane, Jr.
Dorothy J. DeFord
Homer H. DeFord
Louis A. DeHaes
James H. Depenbrock
Barbara Sue Woolf Devereux
Julien Devereux
James F. Dewey
George F. Dillman
Leemond P. Dodd
Louise Dodd
Dennis J. Dolan
Thomas E. Dolan
Patricia G. Dolan
Joan M. Dolan
Marguerite A. Domatti
Stanley J. Donnell
John H. Eix
Raymond I. Emery
Elnora Evans
Thomas A. Ewers
Allen Maurice Fain
Lourene Fain
Carlene Farley
Frances M. Farr
Mayme Lou Ferguson
Firbeau Company

First City Bank
Henry A. Forster
Montez W. Forster
Helen H. Forteith
Frances C. Foster, Executor of The Estate of Nolan N. Foster
Mattie R. Fouts
Roy W. Fouts
Glenn A. Foy, Jr.
Mary Ellen Hardy Foy
J. T. Freeland
Odessa Freeman
David M. Gallaway
R. M. Ginsberg
Mary J. B. Glenn
Elwood J. Goodier, Jr.
Harry M. Graham
Mark A. Graham
Warren L. Gravely, Jr.
Claude Graves, Jr.
Willis A. Grayson
Charlsye Green, Executor of the Estate of W. D. Green
Monard Gregg
Elizabeth Griffis
Truman Griggs
James C. Hadsell
William H. Haley, Jr.
Bethaney Jo Hall
J. B. Haralson
Jeffery Kurt Haralson
Dr. Calvin W. Harris
Marcielle Harris
James M. Hatler
William B. Henley, Jr.
Mary S. Hiegel
Al Hill, Jr.
Frank A. Hoke
Asa Holleman
Billie Frances Holleman
J. Frank Holt
Rosa Lee Hull
E. F. Hutton & Co., Inc.
Ivan Irwin, Jr.
Ruby M. Johnston
Dixie Shelley Jones
John J. Joyce
Dr. E. J. Justema
Milton C. Justice
Kidder Peabody & Company, Inc.
John Muir Kipp
William Marble Kipp
Donald H. Kitzrow
David H. Kitzrow
Troy K. Kitzrow
Ed J. Kunecki
Harry P. Kunecki
Eva Kathryn LaCoke
Frank LaCoke
Julio S. Laguarta
Traylor Lander
Frederick M. Lange
Jean C. Latimer
L. J. Lee
Naomi Lee
George Lenox
Robert S. Lipson
Joseph F. Lollman
William F. Lynch
Joe W. Maddox
Donald J. Malouf
Eura Mason
J. D. Mason
Opal McAdams
Pat McDowell
Julian M. Meer
Sarah Ann Meredith
Charles (Bo) Miller
Gregory Milliorn
Kemberly Milliorn
Michael Raymond Milliorn
Dovie Milner
Roy L. Milner
Vera Morrison
L. Craig Morton
William C. Murphy
Eloise R. Myers
Jan Jager Newberry
Charles Brandon Newman
James E. Norwood
Evelyn Clay Marcus O'Hara
N. D. Oswald
Bette Parnell
Kyle Parnell
Thelma Peters
Albert C. Phillips
Daphne M. Phillips
Harvey M. Phillips
Jewel Phillips
K. W. Pickering
R. O. Pietzsch

John Pillow
Cyril J. Pokladnik
Joseph E. Pokladnik
Mrs. H. M. Poston
Joyce Race
Robert G. Race
James C. Raddatz
Harry V. Rankin
Rauscher Pierce Refsnes, Inc.
Ras Redwine
Jack Rich
Fred Rizk
William J. Rochelle, Jr., Trustee in Bankruptcy for Angus G. Wynne, Jr.
James R. Rodgers
John C. Rogers
William R. Rutherford
Dr. John Ryan
Jack B. Ryan
S.N.S. Co.
Dorothy Salisbury
Perry S. Salisbury
Bert Sanger, Jr.
Mary Julia Sanger
Keith Tristan Sanger
Dr. P. W. Schneider
Stanley J. Scott
J. M. Severson
Mary Ward Sheldon
James W. Simmons
Don S. Simpson
Charles M. Sloan
Addalee Ann Smith
F. Gilbert Smith
J. T. Smith
Mr. and Mrs. Ray F. Smith
Anthonette M. Smith
Troy R. Smith, Jr.
Mary Snow
F. J. Spillman
John O. Spring
H. D. Stanley
Arlene Marie Sterling
Mr. and Mrs. J. W. Sterling
Mary Jean Sterling
Thomas H. Sterling
Rosa Lee Stinett
Raymond D. Sudduth
Tommie M. Sudduth
Allena Taylor
Vernon O. Teofan
Texas Commerce Bank – Austin
Texbank & Co.
Ann Victoria Thomas
Callie Thompson
Craft Thompson
Craft Thompson, II
Mrs. Craft Thompson
A. Modine Thompson
John E. Thompson
Tony Todora
Dr. R. G. Tromly
Raymond P. and Minnie Pearl Truelove
Charles Underwood, Jr.
Phillip Vaccaro
Garner F. Vollmer
John S. Walker
Jeanette P. Wallace
Robert E. Wallace
Richard L. Walton
E. John Ward
Louis A. Watson
Nathan A. Watson
John Wayne
Milton M. Weinberger
William M. Weiss
Tim West
Carl Westcott
John W. Williams, Jr.
Brooksie Jeanne Willie
Raymond Willie, Jr.
Edward A. Wolff
Willie H. Wolff
William M. Womack
Mr. and Mrs. C. Wayne Woodring
Lloyd C. Woody
Agnes C. Woody
Jack I. Woolf
Orien L. Woolf
J. C. Wright
Lois Wright
R. C. Wynn
Raymond G. Zauber

The following entities are parent companies, non-wholly owned subsidiaries, or affiliates of one or more of the petitioner corporations:

Allied Bancshares, Inc.
Austin Bankshares, Inc.
Brookhollow Bancshares, Inc.
BankTexas Group Inc.
Continental Bancshares, Inc.
Cullen/Frost Bankers, Inc.
Dallas Bancshares
First City Bancorporation of Texas, Inc.
GAB Co.
InterFirst Corporation
InterFirst Services Corp.
International Energy Bank
Inter-Regional Financial Group, Inc.
Inverfin, S.A.
Inwood Bancshares, Inc.
Mercantile Texas Corporation
Mercantile Dallas Corporation
NorthPark National Corporation
Republic of Texas Corporation
Pine Island Corporation
Prairie Canal Company
Reunion Bancshares, Inc.
Southwest Bancshares, Inc.
Texas American Bancshares, Inc.
Texas Commerce Bancshares, Inc.
United Petroleum Company
WHC Corp.
Wynnewood Bancshares, Inc.

Respondents

The following county, town, cities, and independent school districts, all of which are subdivisions of the state of Texas, are respondents in this cause:

Dallas County
City of Dallas
Dallas Independent School District
City of Garland
Garland Independent School District
Town of Highland Park
Highland Park Independent School District
City of Richardson
Richardson Independent School District

The following tax assessor-collectors for the above state subdivisions are respondents in this cause:

John Childs
Max Noller
Tom Landrum
J. W. Walls
Larry Devers
N. G. Johnson
Joy Mongomery
Ernest Richardson

The following Boards of Equalization and those boards' members are respondents in this cause:

Board of Equalization of Dallas County, and its members Gary A. Weber, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr.

Board of Equalization of the City of Dallas and the Dallas Independent School District, and its members Port E. Stages, Jr., A. C. Moser, Jr., Dorothy Ramsey, and Jim S. Lake.

Board of Equalization for Richardson Independent School District, and its members R. H. Thompson, Nelson McCord, and Morris James.

Board of Equalization for Town of Highland Park and its members Frank R. Garrott, John Taylor, and George Nicaud.

Board of Equalization for the Highland Park Independent School District and its members Dr. Wendell A. Jones, Robert F. Titus, Morris E. Yarbrough, Jr.

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF FOR PETITIONERS

OPINIONS BELOW

The original opinion of the court below in Case No. 20660[1], withdrawn by the court below on rehearing and not published, is reproduced at Joint Appendix (App.) 164. The first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at App. 174. The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at App. 198.

The summary opinions of the court below in Case Nos. 20915 and 20659, relying exclusively on the opinions in Case No. 20660, were not reported and are reproduced at App. 127 and 281 respectively.

[1]Three cases in the court below are before this Court for review: American Bank and Trust Company, et al. v. Dallas County, et al. (No. 20915), Bank of Texas, et al. v. Childs, et al. (No. 20660), and Wynnewood Bank & Trust et al. v. Childs, et al. (No. 20659).

JURISDICTION

The judgments of the court below were entered in Case Nos. 20660 and 20659 on January 23, 1981, and timely motions for rehearing in those cases were denied on May 1, 1981. The judgment of the court below was entered in Case No. 20915 on June 3, 1981, and a timely motion for rehearing was denied on July 1, 1981.

Petitioners made timely applications for writs of error to the Supreme Court of Texas, which declined to review the judgments below by denying writs of error in all three cases on January 6, 1982.

On March 17, 1982, petitioners filed a petition for a writ of certiorari, and on November 1, 1982, this Court granted certiorari as to Question No. 1 presented in the petition.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS

REVISED STATUTE 3701 (31 U.S.C. § 742)[2]

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof

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[2]Rev. Stat. 3701 differs from 31 U.S.C. § 742, its unenacted code section counterpart. 31 U.S.C. § 742 begins with the introductory phrase, "Except as otherwise provided by law", which does not appear in Rev. Stat. 3701.

imposed on corporations and except estate taxes or inheritance taxes.[3]

REVISED STATUTE 5219 (12 U.S.C. § 548)

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing

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[3]Effective September 13, 1982, Rev. Stat. 3701 was replaced by 31 U.S.C. § 3124, which provides:

(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except –

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax.

(b) The tax status of interest on obligations and dividends, earnings, or other income from evidences of ownership issued by the Government or an agency and the tax treatment of gain and loss from the disposition of those obligations and evidences of ownership is decided under the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.). An obligation that the Federal Housing Administration had agreed, under a contract made before March 1, 1941, to issue at a future date, has the tax exemption privileges provided by the authorizing law at the time of the contract. This subsection does not apply to obligations and evidences of ownership issued by the District of Columbia, a territory or possession of the United States, or a department, agency, instrumentality, or political subdivision of the District, territory, or possession.

This revision was part of a larger effort by Congress to "codify, and enact without substantive change" numerous provisions of title 31 of the United States Code. H.R. Rep. 651, 97th Cong., 2d Sess., p. 1 (1982).

under the laws of the State or other jurisdiction within which its principal office is located.

TEX. REV. STAT. ANN. ART. 7166 (VERNON 1960)[4]

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders

[4]In 1982 Article 7166 was replaced by substantively similar provisions of the Texas Property Tax Code. *See* Tex. Prop. Tax Code §§ 21.09, 22.06, 23.11, and 25.14.

thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

In the three cases before the Court for review, petitioners challenge the assessment of local property taxes on the shares of the petitioner banks as violating the immunity from state taxation enjoyed by United States obligations. In Case No. 20915, petitioners challenge the tax imposed for the year 1980 with respect to the shares of all of the petitioner banks. App. 8-19. In Case Nos. 20660 and 20659, petitioners challenge the taxes imposed for the year 1979 with respect to the shares of two of the petitioner banks (Bank of Texas and Wynnewood Bank & Trust). App. 144-146, 261-263. The petitioners are the banks whose shares were assessed for taxation and those banks' shareholders, either individually (in Case Nos. 20660 and 20659) or as a class (in Case No. 20915). App. 121, 133, 255.

The tax is authorized by Texas statute, Article 7166, Tex. Rev. Civ. Stat., but the tax is assessed, imposed, and collected by the county, city or town, and school district in which the bank is located. The respondents are the local Dallas-area taxing districts (county, cities, town, and school districts) and authorities (tax assessors, boards of equalization, and others) who assess, impose, and collect the challenged taxes. The question presented in this cause is identical in all three cases. App. 127, 174, 281.

Property taxes are computed by first determining the value of the property for tax purposes (assessed value), and then applying the local taxing district's tax rate to that value; the rate is expressed in terms of so many dollars of tax liability for each $100 of assessed value.

Pursuant to a long-standing practice between banks and taxing authorities, the tax bills for the share taxes were sent to petitioner banks. App. 44-47, 49, 53, 54-55, 58, 60, 69. Article 7166 provides that if the share taxes are not paid, banks are prohibited from declaring dividends or transferring any shares on which the taxes are delinquent. Because there is no statutory or practical method to determine if taxes on particular shares have been paid, the banks pay the taxes as agents of the shareholders in order to keep their shares free of restrictions.[5]

The respondents determined the assessed value of each bank's outstanding shares based on that bank's total assets (including United States obligations), less the bank's liabilities and the assessed value of its real estate.[6] App.

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[5]In Case No. 20915 in the court below, the 52 petitioner banks paid the taxes assessed upon their shares to the appropriate respondent cities, town, and school districts pursuant to an agreement with those respondents which provides for a refund to the banks if the taxes are ultimately declared unlawful in this case. The agreement was necessary because until tax year 1982 there was no clear procedure for obtaining a refund of taxes which have been determined to be illegal. Respondent Dallas County refused to enter into such an agreement; consequently the court below entered an injunction pending appeal against any collection efforts and provided that the petitioner banks pay the taxes into the registry of the court (Order of the court below dated February 27, 1981), and they did so. In Case Nos. 20659 and 20660, the court below entered an injunction pending appeal without providing for payment into the registry of the court. (Orders of the court below dated September 24, 1980.)

[6]The assessed value of a bank's real estate is deducted, pursuant to Article 7166, to prevent the double taxation that otherwise would be caused by taxing the real estate as part of the share tax and taxing it to the bank separately as other real estate is taxed. App. 32-33, 48. Real estate is the only property of a bank which is taxed to the bank itself. App. 57, 61, 66.

32, 50-51, 53, 55-56, 59, 62, 67, 68, 156, 223. See opinion below at App. 183.

The respondent taxing authorities used a bank balance sheet known as a "call statement" for each bank in determining the assessed value of that bank's shares.[7] App. 30-31, 43, 50, 56-59, 62, 67-68. The call statement is a statement of condition prescribed by regulatory authorities (App. 30, 71-72) showing all of a bank's assets, liabilities, and net worth. It lists specifically the amount of United States Treasury securities and of other United States agency obligations owned by the bank as of the date of the call statement. App. 72, 92.

By using a call statement the taxing authorities did not have to compute the difference between assets and liabilities to determine net assets because the call statement includes a line item that shows the difference. That line item is "Total Equity Capital" on the call statements; it is referred to by the respondent taxing authorities as "equity capital," "net assets," "shareholders equity," "capital accounts," "capital structure," or the combined value of "capital, surplus and undivided profits." App. 31, 32, 50, 51, 52, 55-56, 59, 156.

In measuring the tax by assets (other than the real estate) less liabilities, the respondent taxing authorities refused to make or permit any deduction for United States obligations held as assets by the banks. App. 32, 34, 50-51, 53, 55-57, 59, 62, 67, 68, 109-118, 156-157, 223-224.

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[7]A sample call statement, taken from Plaintiffs' Exhibit 8 in Case No. 20915 (offered at R. 129, admitted at R. 132), is included at App. 92-97. The respondents used the year-end call statement (December 31) because the date on which the value of the property is to be determined for tax purposes is January 1, a banking holiday. App. 31.

The United States obligations owned by each bank were therefore taken into account in calculating its net assets, which were then used to measure the taxable value of the shares.

Petitioners in the trial court sought injunctive and declaratory relief against the tax on the ground, among others, that respondents violated Rev. Stat. 3701 (31 U.S.C. § 742) in computing the tax without a deduction for the banks' United States obligations. App. 20-22, 148-149, 261-263. The court below addressed and denied this claim of petitioners on the ground Rev. Stat. 3701 was not violated by the tax. See opinion below at App. 127, 182-204, 281.

SUMMARY OF THE ARGUMENT

Prior to 1959, when Rev. Stat. 3701 only prohibited taxes upon United States obligations, this Court held that a local property tax upon shareholders could be measured by corporate-owned United States obligations without violating Rev. Stat. 3701. The rationale of these cases was that a tax on shares owned by shareholders is not a tax upon the United States obligations used to measure the tax.

In 1959 Rev. Stat. 3701 was amended to expand the state-tax exemption enjoyed by United States obligations to prohibit any form of state or local tax in which those obligations are "considered . . . in the computation of the tax . . . ." The plain meaning of the amendment prohibits any local tax which takes into account the value of United States obligations in the computation of the tax. This conclusion is supported by the plain and ordinary meaning of Rev. Stat. 3701, prior case law, the statutory scheme, and the purpose of the Congressional bill of which the amendment to Rev. Stat. 3701 was a part.

Respondents measure the taxable value of the shares by the banks' assets less liabilities, without any exclusion for United States obligations held as assets. Because the assets of the petitioner banks include United States obligations, those obligations have been considered, or taken into account, in the computation of the tax in violation of the 1959 amendment to Rev. Stat. 3701.

ARGUMENT

The Tax Violates the 1959 Amendment to Rev. Stat. 3701

Pre-1959 Law

In *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829) the Court held a state could not impose a property tax on obligations of the United States. This rule was designed to protect the borrowing power of the federal government, and was derived from the Borrowing clause and the Supremacy clause of the United States Constitution. U.S. Const. Art I § 8, cl.2 and Art. VI, cl.2. This rule was later embodied in a succession of federal statutes ultimately resulting in Rev. Stat. 3701.[8] In 1926 it was published in the United States Code as 31 U.S.C. § 742.[9] Until 1959 Rev. Stat. 3701 provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

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[8]The evolution of the statute is reviewed in *Smith v. Davis*, 323 U.S. 110 (1944).

[9]The difference between Rev. Stat. 3701 and unenacted 31 U.S.C. § 742 is described in footnote 2, p. 2, above.

Following *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829), the Court examined a variety of state bank taxes to determine whether a deduction had to be made for United States obligations in the computation of the tax. The Court concluded that a tax *upon* the bank's property, that included United States obligations, violated the prohibition against state taxation of United States obligations, regardless of whether the tax was directly on that property, or indirectly on it as part of the net assets of the bank. *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865); *The Banks v. The Mayor*, 74 U.S. (7 Wall.) 16 (1869); *Home Savings Bank v. Des Moines*, 205 U.S. 503 (1907); *Society for Savings v. Bowers*, 349 U.S. 143 (1955).

In *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866), however, the Court said that a state property tax upon the shares owned by shareholders in a national bank did not require the deduction of United States obligations held by the bank, even though the capital of the bank was invested in United States obligations. The Court reasoned that a tax upon shares in a banking corporation is not a tax upon the assets of the bank which include United States obligations. Shares represent a separate property interest from the bank's assets, and therefore a tax upon the shares is not one upon the bank's assets.

Subsequent decisions confirmed the Court's reasoning in the *Van Allen* case that a tax upon corporate shares, even if measured by net assets that included United States obligations, was not upon the net assets of the corporation, and therefore did not violate Rev. Stat. 3701 as it existed until 1959. *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923); *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902). Under these pre-1959 decisions, there was "no authority for taxing [a United States obligation] to the bank, but only for taking it into account in valuing the

shares to the shareholders". *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 116 (1923).[10]

This distinction between a tax upon net assets which included United States obligations and one which merely considered net assets also found application in other forms of taxation. For example, in *Werner Machine Co. v. Director of Division of Taxation*, 350 U.S. 492 (1956), the Court held that a state tax upon a corporation's franchise, measured by net assets, did not require the deduction of United States obligations held as assets because the tax was upon the franchise, not the assets. In the *Werner Machine Co.* case the Court noted the similarity between a tax upon the franchise and one upon shares, and the fact that neither required the deduction of United States obligations included in the measure of the tax because neither was upon those obligations. 350 U.S. at 494. *Accord, Home Ins. Co. v. New York*, 134 U.S. 594 (1890).

Similarly, the Court held that state inheritance taxes could be measured by the value of United States obligations without violating Rev. Stat. 3701 as it existed prior to 1959. In *Plummer v. Coler*, 178 U.S. 115 (1900), the Court reasoned that just as a franchise tax is upon the franchise, an inheritance tax is upon the transfer; because neither tax is upon the United States obligations used to measure the tax, neither required the deduction of those obligations. *Id.* at 135-136.

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[10]Regardless of the nature of the tax, however, if it is one that discriminates against United States obligations then it is constitutionally infirm. *See, e.g., Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935). Petitioners claimed discrimination in the court below, but certiorari was not granted as to the discrimination question.

The 1959 Amendment to Rev. Stat. 3701.

In 1959 Congress expanded the prohibition provided by Rev. Stat. 3701 (31 U.S.C. § 742) by adding the following sentence:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be *considered,* directly or indirectly, *in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.*

Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 621.

The pre-1959 distinction between a tax upon United States obligations and a tax upon shares (or upon a franchise or upon a transfer at death) measured by the value of assets that include those obligations, only had significance in the context in which it was announced and applied — that is, in the face of a federal prohibition only against state taxes upon United States obligations. The 1959 amendment to Rev. Stat. 3701, however, prohibits both taxes upon United States obligations and taxes which *consider* those obligations, with certain specific exceptions (*i.e.,* franchise and death taxes).

Interpretation of the 1959 amendment to Rev. Stat. 3701 should begin with the language of the amendment. *Andrus v. Allard,* 444 U.S. 51, 56 (1979). And "unless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning." *Diamond v. Chakrabarty,* 447 U.S. 303, 308 (1980), quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979). The word in the amendment that is critical to the question presented is "con-

*Emphasis supplied.

sidered." That word was not given a special definition by Congress, and we therefore begin by examining that word's ordinary meaning.

In an ordinary sense, "considered" means "taken into account". *Oxford English Dictionary,* p. 859 (1971). *See also, Webster's Third New International Dictionary* 484 (Unabridged Edition 1969) ("taking into account"); *Funk & Wagnalls Standard Desk Dictionary,* p. 136 (1969) ("To take into account"); Rodale, *The Synonym Finder,* p. 219 (1978) ("take into account"). [11] The common meaning of "considered," in the context of the 1959 amendment, extends the prohibition of Rev. Stat. 3701 to all taxes which are computed by a value measured in part by United States obligations, because such taxes "consider" or "take into account" those obligations.

This ordinary meaning of "considered" is the very same as the sense in which this Court and others had used that word in describing the computation of share taxes measured by net assets that include United States obligations. In *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 112 (1923), this Court held that a share tax calculated with "controlling consideration" given to the net assets of the bank, which included United States obligations, did not violate those obligations' immunity from state taxation because of the *Van Allen* distinction that the tax was upon the shares rather than the bank's assets. The Court further recognized that the prohibition contained in the then existing Rev. Stat. 3701 left "no authority for taxing [a United

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[11] "Considered", of course, has other meanings, but they make no sense when read into the amendment because they refer only to a mental state. For example, "considered" also means "characterized by deliberate thought" and "maturely reflected on," as in the phrase "In my considered judgment." *Oxford English Dictionary,* p. 859 (1971).

States obligation] to the bank, but only for taking it into account in valuing the shares of the stockholders." *Id.* at 116.

States have also used the term "consider" to describe the valuation of shares for purposes of taxes measured by net assets. In *Midland v. Midland National Bank*, 607 S.W.2d 303, 304 (Tex. Civ. App. — El Paso 1980, *writ ref'd n.r.e.*) the Texas court held in 1980, one of the tax years involved in the cases at bar, that all assets of the bank listed on its balance sheet are "included and considered in arriving at the value of the Bank's shares" for the purposes of Article 7166, Tex. Rev. Civ. Stat. In *Security Savings Bank of Cedar Rapids v. Carroll*, 103 N.W. 379, 380 (Iowa 1905) the court recognized that a tax assessor was required to take a bank's United States obligations into "consideration each year in determining the assessable value of the shares" for the purpose of a bank share tax. The Texas attorney general ruled in Tex. Atty Gen. Op. No. 0-4675 (1942) that a bank's assets, other than real estate, are "to be taken into consideration . . . in fixing the value of the [bank's] stock for tax purposes" under Art. 7166, Tex. Rev. Civ. Stat.

These state authorities and this Court's pre-1959 decisions recognized that in computing a share tax measured by net assets, taxing authorities necessarily "consider", or take into account, corporate-owned United States obligations. Thus, the 1959 amendment to Rev. Stat. 3701 now explicitly forbids precisely what the Court had permitted under the earlier version of the statute — considering United States obligations in computing a local share tax.

The tax assessed by respondents violates the plain meaning of the explicit prohibition contained in the 1959 amendment to Rev. Stat. 3701. Respondents measure the value of

the banks' shares by taking into account each bank's assets, less liabilities and real estate.[12] Because the bank's assets include United States obligations, which respondents refused to deduct, the respondents have considered, or taken into account, those obligations in the computation of the tax.

Although statutory construction should involve a choice between two alternative readings of the statute,[13] respondents have not suggested what else "considered" may mean; rather, respondents have argued that the 1959 amendment was not intended to make any change in the law, notwithstanding the language of the amendment.[14] See Brief in Opposition for Respondents the City of

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[12] Respondents said they "don't look at the assets or liabilities" (App. 43), but rather looked only to the net assets. See p. 7, above. This Court has recognized, however, that whether the taxpayer or the tax assessor arrives at the computation of the *net* assets (by deducting liabilities from assets) is not material to whether United States obligations have to be deducted. *Bank Tax Case*, 69 U.S. (2 Wall.) (200) (1865). The principle applies equally here: just as a tax upon *net* assets is upon United States obligations held as assets, a tax which considers *net* assets, considers the obligations held as assets. *See also, Society for Savings v. Bowers*, 349 U.S. 143 (1955).

We have addressed the manner in which this tax was actually computed because the Court has held that where "the validity of [a tax] assessment by officers of the state is properly challenged, and the matter comes here, this Court must determine the effect of the thing actually done. What might have been done under the local statute is not controlling." *First National Bank of Gulfport v. Adams*, 258 U.S. 362, 364 (1922).

[13] Frankfurter, *Some Reflections On The Reading of Statutes*, 47 Col. L. Rev. 527, 528 (1947).

[14] This is also the position of the Georgia Supreme Court in its decision involving the Georgia bank share tax. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 285 S.E.2d 920 (Ga. 1982), appeal docketed, No. 81-1834 (April 5, 1982).

Dallas, et al., pp. 7-9; Brief in Opposition for Respondents Dallas County, et al. pp. 16-21. Respondents' argument is based on the House and Senate reports accompanying the Act of Sept. 22, 1959, Pub. L. 86-346, 73 Stat. 622 (of which the amendment to Rev. Stat. 3701 was a part). *See* H. R. Rep. No. 1148 & S. Rep. No. 909, 86th Cong., 1st Sess. (1959). They contend that because those reports indicate that the amendment clarifies the tax exempt status of interest on United States obligations, and do not mention share taxes, the amendment has no other effect than to make interest on the obligations tax exempt. There is, however, nothing in those reports to indicate that the sole purpose of the amendment was to address this "interest" issue, and such a narrow purpose cannot be inferred for at least three reasons.

First, the Court had held prior to 1959 that interest on United States obligations is tax exempt. *See, e.g., New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950). There was therefore no need to clarify what had already been settled by this Court.

Second, if the interest issue were the only question intended to be addressed by the amendment, then Congress would not have used a 52-word amendment when the words "or the interest thereon" would have been sufficient. Congress did use those four words, and respondents' theory therefore necessarily reads the remaining 48 words of the amendment out of the statute as having no substantive effect.[15] Respondents' interpretation violates the funda-

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[15]While the subsequent acts of Congress are not controlling on the interpretation of an earlier statute, the recent congressional codification of Rev. Stat. 3701 into 31 U.S.C. § 3124, quoted at p. 3, above, is instructive. The new § 3124 removed "Except as otherwise provided by law, all . . . bonds, Treasury notes, and

(Footnote cont'd)

mental principle of statutory construction that courts are "obliged to give effect, if possible, to every word Congress used" in enacting a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Third, and most important, respondents' theory elevates a theoretically-perceived legislative intent, based on the *silence* of the committee reports with respect to share taxes, over the plain meaning of the Congressional enactment. This Court cautioned in *Scripps-Howard Radio, Inc. v. Federal Communications Com.*, 316 U.S. 4, 11 (1942), that the "search for significance in the silence of Congress is too often the pursuit of a mirage." Respondents' argument completely sidesteps the language of the statute, and requires the unwarranted assumption that Congress was ignorant of the known sense in which the word "considered" had been used by this Court and others in describing this type of tax.

Respondents' interpretation of the amendment as being non-substantive is also inconsistent with the statutory scheme of the amendment. The amendment contains specific exceptions to the expanded prohibition. These explicit exceptions demonstrate a positive understanding by Congress that the amendment would prohibit taxes which this Court had found permissible under the earlier statute.

The 1959 amendment to Rev. Stat. 3701 excludes from its expanded prohibition franchise taxes and inheritance and estate taxes. This Court had ruled before the amendment that United States obligations could be considered, or taken into account, in computing franchise, inheritance,

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other" and "directly or indirectly" because they were viewed as mere surplus. H.R. Rep. 651, 97th Cong., 2d Sess., p. 94 (1982). Congress, however, did not remove the word "considered" presumably because it was viewed as a word of substance in its ordinary sense.

and share taxes because those taxes were not *upon* the obligations. *Werner Machine Co. v. Director of Taxation,* 350 U.S. 492 (1956) (franchise tax); *Plummer v. Coler,* 178 U.S. 115 (1900) (inheritance tax); *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573 (1866) (share tax). See page 11, above. Had the amendment not expanded the prohibition, there would have been no reason to provide specific exceptions for franchise and death taxes. The statute had existed for over 100 years without specific exceptions.

Share taxes, however, are not a named exception, as are franchise and death taxes. Consequently the amendment's "language admits of no exceptions" and to imply an additional exception would be to "ignore the ordinary meaning of plain language." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 173 (1978).

Finally, the plain-meaning construction of Rev. Stat. 3701 is consistent with the legislative history of the amendment. The 1959 amendment to Rev. Stat. 3701 was a small part of the Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622, the Congressional history of which reflects a consistent theme: make United States obligations more attractive investments so those obligations can compete effectively in the marketplace at the lowest possible cost to the Federal government. Thus it makes sense that Congress expanded those obligations' tax-exempt feature and thereby made them more attractive investments by increasing their effective yield.

In June of 1959, President Eisenhower asked the Treasury to transmit to Congress proposed legislation that sought to remove the ceiling on interest paid on certain United States obligations so that the public debt could be effectively funded and to make "certain other

technical proposals" which would enable the government to "manage the debt as economically as possible in terms of interests costs." 105 Cong. Rec. p. 10164 (1959). The President's request ultimately resulted in the enactment of Pub. L. No. 86-346, which included the amendment to Rev. Stat. 3701.[16]

The congressional debates on the bill were often between those who favored increasing long term government bond interest rates to a level comparable with the market in order to adequately finance the government, versus those who opposed increases in rates because of their effect on inflation or interest rates generally. *See, e.g.*, 105 Cong. Rec. (1959) pp. 18156, 18159, 18160, 18165, 18483, 18511-18512, 18513, 18527. The bill as finally enacted reflects a legislatively determined reconciliation of those goals. Instead of removing the interest rate ceiling on certain United States obligations as the President requested, Congress only raised the interest rate ceiling, but at the same

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[16]The House and Senate Reports on Pub. L. No. 86-346 do little more than reiterate the words of the amendment:

> Under the amendment, a new sentence is added to section 3701. The new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes [sic] and except estate taxes or inheritance taxes.

H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959); S. Rep. No. 909, 86th Cong., 1st Sess. 12 (1959). Additional legislative history materials are contained in Brief For the United States as Amicus Curiae, pp. 14-16, filed in September, 1982.

time expanded the obligations' tax exempt feature.[17] In this way Congress increased the yield on the obligations at the lowest possible cost to the government — thus making the obligations more marketable without escalating interest rates and fueling inflation any more than was necessary.

The United States Treasury has stated that bank share taxes, like the one involved here, that consider United States obligations in their computation, "effectively reduce the yield of Federal obligations, and make them less attractive investments" — a result at cross purposes to that intended by Public Law 86-346. *See* Brief for the United States as Amicus Curiae p. 7, filed in September, 1982.

The Decision Below

The plain meaning of the prohibition contained in Rev. Stat. 3701 was given effect in decisions that preceded the decision below. In *First Security Bank of Bozeman v. Montana Department of Revenue,* 580 P.2d 913, 914 (Mont. 1978) the Supreme Court of Montana held that a state bank share tax, like the tax involved here, being "measured by corporate asset values, without making any deduction for federal obligations owned by the bank" violates the 1959 amendment to Rev. Stat. 3701. The Court followed its earlier decision in *Montana Bankers Association v. Montana Department of Revenue,* 580 P.2d 909, 912 (Mont. 1978), which held that the 1959 amendment is "clear, unambiguous, direct and certain" and by its broad language forbids taxes like the one involved here.

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[17]Congress presumably recognized, as this Court did in *Society for Savings v. Bowers,* 349 U.S. 143, 148 (1955), that a share tax measured by net assets is "difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations is concerned."

The court below originally followed the Montana decisions (App. 164-171), but on rehearing concluded that the Montana decisions ignored Rev. Stat. 5219 (12 U.S.C. § 548) which the court felt constitutes an exception to the sweeping prohibition provided by Rev. Stat. 3701. (App. 184-185). Rev. Stat. 5219 provides:

> For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the state or other jurisdiction within which its principal office is located.[18]

The court below concluded that this Court's decision in *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573 (1866), had held that Congress consented in Rev. Stat. 5219 (12 U.S.C. 548) to a state tax on the shares of national banks that considers United States obligations; and it interpreted this Court's decision in *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902) as having extended that consent with respect to state banks. App. 184-185. The court below then held that the consent allegedly embodied in Rev. Stat. 5219 falls within the "Except as otherwise provided by law" introductory provision of unenacted code § 742 of Title 31. The lower court's theory is incorrect for at least three reasons.

First, while the phrase "Except as otherwise provided by law" does introduce the unenacted 31 U.S.C. § 742, it has never been part of Rev. Stat. 3701, either before or since 1959. As this Court has held, the "Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States,* 319 U.S. 423, 426

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[18] The earlier permanent versions of Rev. Stat. 5219 are reproduced at Petition Appendix pp. 53a-57a.

(1943).[19] Thus the introductory phrase cannot be used as a vehicle for an implied exception to the sweeping prohibition contained in the 1959 amendment to Rev. Stat. 3701.

Second, the basis of the *Van Allen* rule was only that a tax upon shares is not upon the bank's assets, and therefore no deduction for bank-owned United States obligations was required because at the time federal law prohibited only taxes upon United States obligations. This Court so interpreted the *Van Allen* case in *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 112 (1923), and relied on the same distinction to uphold pre-1959 bank share taxes imposed on state banks. *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902). *See also, Home Savings Bank v. Des Moines*, 205 U.S. 503, 518 (1907); *Society for Savings v. Bowers*, 349 U.S. 143, 147-148 (1955). In the *Home Savings Bank* case the Court explained (205 U.S. at 517):

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[19] Even if the introductory clause of 31 U.S.C. § 742 were included in Rev. Stat. 3701, there is no reason to believe that it refers to Rev Stat. 5219, as the court below assumed. Rev. Stat. 3701 and 5219 had coexisted for approximately 50 years without cross-reference when the Code was published in 1926, and this Court had recognized that there is no "want of harmony" between those statutes. *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 115 (1902). The more likely object of the cross-reference is to the Act of Aug. 13, 1894, ch. 281, 28 Stat. 278, which had legislatively overruled *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1869), and modified Rev. Stat. 3701 to the extent of removing from the exemption circulating notes of national banks, United States legal tender notes and other notes circulating as currency. See McClenon & Gilbert, *Index to the Federal Statutes*, 1874-1931 1243 (1933), listing the Act of Aug. 13, 1894, as an implied amendment of Rev. Stat. 3701. Messrs. McClenon and Gilbert were with the Library of Congress's Legislative Reference Service, and in the preface to the 1926 edition of the Code (at v), "[a]cknowledgment of the valuable assistance is given to W. H. McClenon . . . ."

> The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *M'Culloch v. Maryland*. . . . The distinction appears, however, to have been first made the basis of a decision in *Van Allen v. Assessors*. . . .

Contrary to the view of the court below neither the *Van Allen* case, nor this Court's later decisions upholding pre-1959 taxes on shares of state banks, rested on some supposed consent granted by Congress in Rev. Stat. 5219 to the taxation of United States obligations held by banks.

Third, the lower court's theory that Rev. Stat. 5219 consents to the consideration of United States obligations in the computation of a local bank share tax that would otherwise be prohibited under Rev. Stat. 3701, is divorced from the language of any existing statute. Rev. Stat. 5219 only permits national banks to be taxed as state banks are taxed, and Rev. Stat. 3701 deals only with the treatment of United States obligations. Neither statute even suggests a special tax rule for United States obligations owned by a state or national bank. And the lower court's theory would ascribe to Congress an astonishing intent: United States obligations are exempt from any form of taxation which considers them in computing a tax — unless they are owned by a bank. No congressional purpose could be served by discouraging banks from owning United States obligations, and no such purpose is evidenced by either Rev. Stat. 3701 or Rev. Stat. 5219.

CONCLUSION

The 1959 amendment is not subject to the implied exception the court below grafted upon its broad and compelling prohibition. On the other hand, giving effect to the ordinary meaning of the statute's words reflects the sense in which this Court and others had used those words in describing

share taxes measured by net assets, is consistent with the statutory scheme, and achieves the purpose of the Congressional bill of which it was a part.

The 1959 amendment to Rev. Stat. 3701 forbids local taxes which consider, or take into account, United States obligations in the computation of the tax. Respondents used the banks' assets (other than real estate) less liabilities to measure the taxable value of the shares in the petitioner banks. In computing the tax respondents refused to make any deduction for United States obligations held among the banks' assets. Thus, the tax assessed by respondents considers those obligations in the computation of the tax and thereby violates the plain and unambiguous prohibition of Rev. Stat. 3701.

For the reasons discussed above, the tax assessed by respondents should be declared to be in violation of Rev. Stat. 3701 (31 U.S.C. § 742), and the judgments of the court below should be reversed and remanded.

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Respondent's Brief

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NO. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners

v.

DALLAS COUNTY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR RESPONDENTS DALLAS COUNTY, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

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January 14, 1983

QUESTION PRESENTED[1]

1. Whether 31 U.S.C. §742 (Rev. Stat. 3701) requires that United States obligations owned by a banking corporation be deducted from the cash value of an individual shareholder's shares in the banking corporation in order for a state ad valorem tax on the individual shareholder's stock to be valid.

[1]Respondents, being dissatisfied with the Petitioners' presentation of the Question Presented, have rephrased the question so as to more clearly and accurately state same.

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STATUTORY PROVISIONS

12 U.S.C. § 548 (Rev. Stat. 5219)

Because of the importance of the language of this statute as it existed at the time of the 1959 Amendment to 31 U.S.C. § 742 (Rev. Stat. 3701), the Statute as it existed in 1959 is reproduced in the appendix hereto at page A-1.

STATEMENT OF THE CASE

In 1885, the State of Texas imposed by statute (Tex. Rev. Civ. Stat. Ann. art 7166 (Vernon) in effect until January 1, 1980) an ad valorem tax levied on owners of shares of stock in incorporated banks. In 1979, the Texas Legislature completely replaced its tax laws by enacting a new property tax code. As part of that revision, Art. 7166 was repealed and replaced by, first, an interim provision (Tex. Prop. Tax Code Ann. § 11.02) effective January 1, 1980, which co-existed with Art. 7166 until January 1, 1982, when both were replaced by Tex. Prop. Tax Code Ann. § 23.11 (Vernon). Sections 11.02 and 23.11 are reproduced at appendix p. A-3. The new Texas Property Tax Code no longer prohibits the paying of dividends or transfer of stock if the tax is unpaid.

No ad valorem tax is levied against a bank itself save and except on bank-owned real estate (J.A. 66). Neither Art. 7166 nor any other Texas statute compels or requires a bank to pay taxes owed by its shareholders. Nonetheless, apparently because a federal statute[2] permits the banks to deduct the tax payment on their income tax return, banks usually requested to receive from the tax assessors the tax bills owed by their shareholders, in the same way that mortgage companies request and receive tax bills owed by their mortgagors (J.A. 44-47).

Although required by law (Art. 7166) to do so, shareholders never rendered their shares for taxation. (For

[2] 26 U.S.C. §164(e) provides as follows:

"Where a corporation pays a tax imposed on a shareholder on his interest as a shareholder, and where the shareholder does not reimburse the corporation, then —

(1) the deduction allowed by subsection (a) shall be allowed to the corporation; and

(2) no deduction shall be allowed the shareholder for such tax."

example, J.A. 37-38; 58; 63). The tax assessors were thus required by statute to find the "actual cash value" at which to assess each share of stock (J.A. 38; 63). The statute makes absolutely no requirement as to the manner by which the assessor will arrive at the "actual cash value" of the shares and, therefore, does not *require* consideration of United States securities. Assessors use three methods to determine value — cost, income, and market (J.A. 38-39); and in the case of bank stock, most stock was not traded; cost information was not available, nor was the income approach possible (J.A. 39-42). The formula used by the assessors to arrive at the "actual cash value" of the shares, as required by the statute, was the equity capital, and in so doing, they did not look at the assets of the bank at all (J.A. 41-44, 63-66; 155). The assessors did not consider the value of federal securities owned by either the bank or the shareholders (J.A. 35-36). The banks could buy and sell such obligations without affecting the amount of tax imposed (J.A. 44-46), since such transactions do not affect the equity capital from which the taxable value has been usually found (J.A. 70, 71, 73-74, 88-90). Although the tax assessors used the equity capital as the formula to arrive at the statutory requirement of "actual cash value", this method was not required and (on a bill of exception) a qualified stock analyst testified that most of the stocks involved had values which were higher than the values actually used by the assessors (J.A. 80-86, Def.Ex.12, 13, 14 - J.A. 99-103). (This evidence was offered before the trial court only, during the jury trial in the *American Bank and Trust* case, but the Court set aside the jury verdict and judgment was ultimately in favor of the respondents by the Court.)

In the trial of the *Bank of Texas* case, the testimony before the Court showed that the stock was selling for $9.00 per

share when the book value (which was used by the assessor to arrive at "actual cash value") was only $5.85 per share. (Statement of Facts, P.194, in Cause No. 20660, *Bank of Texas, et al. v. John Childs, et al.)* Since the Bank of Texas stock was selling for cash at $9.00 per share and was assessed by the Tax Assessor at $5.85 per share, less the proportionate value of the real estate, understandably the Petitioners have never taken the position that the value is too high measured by cash sales but simply question the formula used.

SUMMARY OF ARGUMENT

One question before this Court is whether or not the 1959 amendment (Act of Dec. 24, 1969, Pub. L. 91-156, 83 Stat. 434) to 31 U.S.C. § 742 (Rev. Stat. 3701) overturned decisions of this Court dating back to 1866. There is no evidence of Congressional intent to do so. The 1959 Amendment did not expand any exemptions from taxation, but merely clarified them. When construed with 12 U.S.C. § 548 (Rev. Stat. 5219) in its 1959 form, 31 U.S.C. § 742 (Rev. Stat. 3701) does not have any "plain language" which would require that the taxable value of bank stock to the owner thereof be reduced by the amount of United States obligations owned by the bank. The term "considered" as used in the amendment logically means a conscious direction of thought. A tax which does not vary as the amount of United States obligations change cannot reasonably be said to *require* that the obligations be considered in the computation of the tax.

The legislative history to the 1969 amendment to 12 U.S.C. § 548 (Rev. Stat. 5219) is full of concern that local taxing entities not suffer any loss of revenue from taxation by reason of the amendment, and shows that Congress certainly never intended to cut off from the states what is a major source of revenue.

Therefore, neither the language of the statute nor legislative history supports the idea that by this innocuous amendment Congress intended to overturn what this Court had four years earlier referred to as "firmly embedded in the law". *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 148 (1955).

ARGUMENT

I. THE FULL VALUE OF BANK STOCK WAS TAXABLE BEFORE 1959.

It is not disputed that at least until 1959, bank stock was subject to a local property tax even though the entire assets of the bank consisted of United States obligations which were themselves exempt from such taxation. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866). There was a clear distinction between a tax on the obligations, which were not subject to taxation, and a tax on shares of stock, which were the separate and distinct property of the stockholders. This distinction, and this exception to the general rule of immunity, is firmly embedded in the law. *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 148 (1955). Furthermore, at the time of the 1959 amendment, there existed a statute, 12 U.S.C. § 548 (Rev. Stat. 5219) which quite specifically recognized and affirmed the right of the States to tax bank stock.

While Petitioners expounded expansively concerning whether or not the opening phrase of 31 U.S.C. § 742 (Rev. Stat. 3701) ("Except as otherwise provided by law") was or was not positively enacted into law, and reach the conclusion that it was not, this argument is not material. Even Petitioners concede that, without such phrase, the tax on bank stock without deduction for United States obligations did

not violate the statute. Although the Court below put some emphasis on the phrase, it went on to say in *Bank of Texas v. John Childs*, 615 S.W.2d 810, 820 (Tex.Civ.App.-Dallas 1981, writ ref'd n.r.e.), that, "The same conclusion follows without consideration of the express exception." (J.A. 191)

Since the phrase is not crucial to the decision below, and since Petitioners do not assert that its absence would have made any difference as to any decisions construing 31 U.S.C. § 742 (Rev. Stat. 3701) prior to 1959, debate on the presence or absence of the phrase is an empty and meaningless exercise.

However, the phrase is important in showing Congressional intent. The United States Code is the official restatement of the laws of the United States (Preface, THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA, 1926). It contains not only the phrase "Except as otherwise provided by law," in 31 U.S.C. § 742 (Rev. Stat. 3701), but also contains 12 U.S.C. § 548, (Rev. Stat. 5219) providing that shares of national banks could be taxed.

II. THE 1959 AMENDMENT TO 31 U.S.C. §742 (REV. STAT. 3701) DID NOT END THE BANK STOCK TAX AUTHORIZED BY CASE LAW AND BY 12 U.S.C. §548 REV. STAT. 5219)

Since it is undisputed that, prior to 1959, States could impose taxes on bank stock without deducting any amount for United States obligations, the claims of Petitioners must rest on showing that the 1959 amendment to 31 U.S.C. § 742 somehow eliminated the right of local taxing authorities to reach (for property tax purposes) the funds that shareholders have invested in bank stock. This Court has had occasion to take note of Congressional concern in this area. In *Bank of*

California, National Association, v. Richardson, Treasurer of the State of California, 248 U.S. 476 (1919), the Court discussed the National Banking Act of 1864, and found that Congress intended no impairment of the taxing power of the States, but on the contrary

> . . . that every resource possessed by the banks as national agencies might in substance and affect remain liable to state taxation. (p. 483)

To determine whether or not the amendment reversed this long-standing Congressional policy, both the language of the amendment itself and the legislative history should be examined.

> When aid to construction of the meaning of words as used in the statutes is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination.

United States, et al. v. American Trucking Association, Inc., et al., 310 U.S. 534, 543-544 (1940).

Turning first to the language itself, the Amendment added the second sentence which reads as follows:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both be considered, directly or indirectly, in the computation of the tax, except non-discriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622.[3]

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[3]As of Sept. 13, 1982, 31 U.S.C. 3124 (which replaces Rev. Stat. 3701) provides, in part, that "The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing the tax, . . ."

Petitioners place a great deal of emphasis on the term "considered" but completely ignore the term "require". They insist that the ordinary meaning of "considered" is "taken into account". They further insist that while the term may also be defined as "characterized by deliberate thought", that such meaning makes no sense in the Amendment.

WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967 Ed.) says about the word "consider" that it may mean, inter alia, "to regard or treat with attention or solicitude", and "to think about with care or caution", and that "consider" may suggest a conscious direction of thought (p. 177-178). BLACK'S LAW DICTIONARY, (Rev. 4th Edition, 1968) defines "consider", inter alia, as "[to] give heed to". Such definitions make perfect sense in the context of the amendment. Under this view, a tax is forbidden if it requires that in the computation of the tax, United States obligations be regarded or treated with attention — that is, where to calculate the tax, the tax assessor must concern himself with the obligations.

In the present instance, the tax assessors testified that they did not need to know if a bank owned any United States obligations when computing the tax. (J.A. 33, 36, 51, 52-54, 55-57, 60, 62, 66-67, 68). As the assessor for the City of Dallas put it,

> That has not been a factor that has been important from the point of view of our office in determining the value of the shareholders' stock and accordingly, it was not taken into account by us. (J. A. 33)
>
> . . . it didn't have anything to do on the analysis that we performed to determine what the value of the shareholders' personal property was . . . (J.A. 36).

BLACK'S LAW DICTIONARY, (Rev. 4th Edition, 1968) defines "require" as follows: To direct, order, demand, instruct, command, claim, compel, request, exact. The Texas statute could not reasonably be said to *require* consideration of the federal securities in the computation of the tax when the statutes simply provide that the stock will be taxed at its "actual cash value" less the value of the real estate.

Federal obligations are not what is being taxed. (J.A. 35, 51, 54, 57, 60, 61, 66-67, 68). What is being taxed is a shareholder's personal property, a share or shares of bank stock. (J.A. 33, 34, 36). How the bank applies and uses its money or the depositor's deposits in it is of no concern to the tax assessor. He is concerned only with valuing and assessing the personal property which the stockholder owns in the form of shares of bank stock.

Thus, the tax assessor does not "consider" the presence, amount, or absence of United States obligations in computing the tax owed by the shareholder on the "actual cash value" of his shares. A shareholder whose bank owns large amounts of United States securities will get the same tax bill as a shareholder whose bank owns no such obligation at all, if the number of shares and cash value per share are equal. Thus, this is a neutral tax, which does not discourage investment by banks in United States obligations. In the hundreds of pages of the records in these causes, with testimony from many bankers, there was not a single banker who stepped forward and claimed to have been influenced by this tax in making investment decisions or who claimed that absent the tax, any different decisions would have occurred. Any statement in the briefs before the Court that this tax, in effect since 1885, has resulted in reduced investment in federal

obligations is pure speculation and is unsupported in the record. Nothing at all has been brought to this Court by Petitioners except assumption and speculation. It would have been easy, if the facts supported it, for the Petitioners to have brought forward data to show that banks in states without a share tax buy more United States obligations than in states with a tax. They chose not to do so, even though as bankers with ready access to the resources of the American Bankers Association, the information was within their control. Under the "adverse inference" rule, it can be presumed that the data would not have been favorable to Petitioners. (See, for instance, *Alabama Power Company, et al. v. Federal Power Commissioner*, 511 F.2d 383, 391 (D.C. Cir. 1974).

To insist that a tax, levied on the value of stock owned by a stockholder, is in actuality a tax which *requires* consideration of a particular asset owned by the business which issued the stock, is to ignore the distinction between stockholder and corporation — a distinction which goes to the very heart of corporate existence.

A state statute which provides that stock be assessed at its "actual cash value" less the proportionate value of the real estate certainly does not require the tax assessor to consider the value of the federal securities owned by the bank in arriving at the "actual cash value" of the stock. 31 U.S.C. § 742, at most, prohibits a state tax that "requires" consideration of federal securities and does not purport to ban a statute where the consideration of federal securities in computation of the tax is not *required* but could be used as an option formula to arrive at a value that does not exceed the actual cash value of the stock if a different formula was used that did not consider federal securities. The Legislative history of the 1959 amendment to 31 U.S.C. § 742

shows that the amendment was only to clarify rather than change the law and was offered to prohibit a state income tax law from taxing income from United States securities.

Neither Article 7166 nor its successor statutes dictate a particular method or computation to be used in appraising bank stock. The Texas statutes require only that the market value of the real property owned by the bank be subtracted from the actual cash value of the bank's stock. "There is no exclusive method for determining the fair cash value of bank stock." TEX. ATT'Y. GEN. OP. NO. WW-1208 (1961).

Although the tax assessors used the equity capital as the formula to arrive at the statutory requirement of "actual cash value", this method was not required and (on a bill of exception) a qualified stock analyst testified that most of the stocks involved had values which were higher than the values actually used by the assessors (J.A. 80-86, Def. Ex. 12, 13, 14 — J.A. 99-103). (This evidence was offered before the trial court only during the jury trial in the *American Bank and Trust* case but the Court set aside the jury verdict and judgment was ultimately in favor of the Respondents by the Court. In the trial of the *Bank of Texas* case, the testimony before the Court showed that the stock was selling for $9.00 per share when the book value (which was used by the Tax Assessor to arrive at the "actual cash value") was only $5.85 per share.) (Statement of Facts, P. 194, Cause No. 20660, *Bank of Texas, et al. vs. John Childs, et al.*) Since the Bank of Texas stock was selling for cash at $9.00 per share and was assessed by the Tax Assessor at $5.85 per share, less the proportionate value of the real estate, understandably the Petitioners have never taken the position that the value is too high measured by cash sales but simply question the formula used.

Although we have seen that the 1959 amendment of 31 U.S.C. § 742 has no effect on a statute that does not

require the tax assessor to consider United States securities in calculating the tax, our evidence in *Bank of Texas* is clear that United States securities are *not* considered and, when we look at the evidence before the tax assessor, he had no way of knowing whether they even owned United States securities and, therefore, could not have considered them. So, the question: Did the tax assessor consider United States obligations in ". . . the computation of the tax"? We submit the answer is that he did not. However, let us look at what he actually did in figuring the tax:

He examined Plaintiffs' Ex. 4 (Statement of Facts 79,83) which gave him the following information from Page 1 of the Exhibit:

"As of January 1, 1979:

CAPITAL STOCK	$1,800,000
SURPLUS	$ 600,000
UNDIVIDED PROFIT	$ 232,078
CAPITAL RESERVES	$ -0-
OTHER CAPITAL ASSETS	$ -0-
TOTAL CAPITAL ACCOUNT Per Call Statement of Banking Commission	$2,632,078

All properties owned (exclude property held in trust) by the bank should be identified by legal description. All properties owned by the bank and located outside of the county should include the assessed value and percentage of assessment so proper credit can be given.

Legal Description of Real Estate owned January 1:

SEE ATTACHED SCHEDULE

Name of Bank:	Bank of Texas
By:	Mark C. Devine — Cashier
Date:	May 7, 1978
Mailing Address:	Box 140100 Dalias, TX 75214"

Page 2 of Plaintiff's Exhibit 4 contained a list of the real estate owned by the bank.

As stated above, the information furnished by the bank did not show that any United States obligations were in those figures and we will see hereinafter why they probably did not do so.

Now, let us see exactly how the value was arrived at by looking at the material on the worksheet used by the Tax Assessor's office and found in the record as page 3 of Plaintiffs' Exhibit 4. He did it as follows:

"CAPITAL	$1,800,000 —		
SURPLUS	600,000 —		
UNDIVIDED PROFIT	232,078 —		
OTHER			
	$2,632,078		
RE o/s Dls Co.	— 351,029		
	$2,281,049 —	35%	798,370 —
Real Estate			
(1) Blk 2869-B 1.462 Acct. #00-02869-002-002-00			178,320
(2) Blk. B Lots 16 & 17 South part 1 In the name of James M. Hatler, III Acct. #32-49650-002-016-00			3,670
(3) Abst. 938 5.00 acs. W.Marks Survey Acct. #65-0938-855-1-010-00			25,160
Total Real Estate			207,150
Share Stock			591,220 —
No. Shares 450,000"			

The testimony of Plaintiffs' witness at the trial was that "As of 12-31-78 the bank owned a total of U. S. notes, direct obligations and agency obligations, par value of $8,960,000." (S.F. P.187, Ln. 2-4). The total amount of the Capital Account was only $2,632,078. Therefore, the eight million plus in securities could not possibly have been in the two million plus Capital Account. This seems to explain why Plaintiffs did not claim that United States obligations were in the Capital Account at rendition time. The United States obligations could have been purchased with depositors' funds or out of funds secured from some creditor and not at all with funds from the Capital Account. Petitioners' theory would try to put $8,960,000 United States securities in a $2,632,078 container. Obviously, it will not work and may explain why they waited twenty years to come forward with their far-fetched and erroneous attempt to escape taxation under the 1959 amendment. This attempt is more unrealistic than those the banks have unsuccessfully attempted to urge upon this Court over the last 100 years. In any event, the record is absolutely devoid of proof that funds from the Capital Accounts were invested in United States obligations.

The value of each share was computed by dividing the capital or net worth (less real estate) by the number of shares.

The tax under the Texas statute is on the actual cash value of the capital stock. That a particiular item is an asset is not to say it is a part of capital. If so, it should be possible to define which capital account such asset is part of, i.e., capital stock, surplus, or undivided profits. Such an exercise is impossible.

There is an additional problem with this rationale. The Consolidated Report of Condition of the Petitioner Bank for

1979 (Plaintiffs' Ex. 11, *Bank of Texas* (S.F. P.140,183,185) shows United States obligations in *excess* of capital. It is, therefore, an impossibility to say that the capital accounts of the bank *included* all United States government obligations, since the amount of obligations is larger than the amount of capital.

How this is possible can be demonstrated as follows:

Demand and time deposits (checking and savings accounts) are liabilities of the bank and are subtracted on the Consolidated Report of Condition from assets in computing capital. Yet these *liabilities* are also *assets* and can be held by the bank in the form of United States obligations. If the obligations are again deducted from capital when computing stock value, the result is a double deduction.

To illustrate further: When a depositor places $1,000 in a savings account, the amount becomes both an asset to the bank, and a liability (since the bank owes it to the depositor). The deposit, therefore, does not change the capital of the bank. The bank may then use the $1,000 to invest in interest-bearing securities, including United States government obligations. However, under the ruling of the Court, if the bank uses the $1,000 to purchase United States government obligations, then each stockholder pays less tax because the ruling requires the County to deduct $1,000 from the capital of the bank (and thereby reducing the value of the stock). Since a liability (a deposit) was used to purchase the security, the amount has already been deducted from assets before computing capital.

Therefore, United States government obligations are more likely to be included in the *liabilities* of the bank (for which deduction is already made) than they are to be included in the *capital.*

A Certified Public Accountant, Joe Jack Mills, County Auditor of Dallas County, was asked the following question and answered as indicated in the *American Bank and Trust* case:

> "Q. (By Mr. Luna) All right. If someone, you or someone else, used this equity capital that we have been talking about as a measuring stick for the value of the stockholders' stock or any other purpose, that person not only would not consider the amount of federal securities, but wouldn't even know that the bank owned any federal securities.
>
> * * *
>
> THE WITNESS: That's true, because this is the only information that we have right here, it doesn't allude to any other elements of the assets or the balance sheet." (J.A. 89)

There was no consideration given to United States obligations in the computation of the tax in either case and, therefore, 31 U.S.C. § 742 is not violated.

In determining what meaning to give to the amendment, it should be kept in mind that the interpretation placed on the amendment by Petitioners would have effectively repealed 12 U.S.C. § 548 (Rev.Stat.5219). It appears from Pl.Ex.8, a portion of which is reproduced at J.A. 92, that of the fifty-two banks in this case, twenty-nine had United States obligations in excess of their equity capital, and thus their shareholders owe no tax at all under Petitioners' theories. Of the rest, only the stockholders of one (Inwood National Bank, which owned no such obligations) would not have had substantially reduced tax bills. The lower court's opinion noted, J.A. 201, (615 S.W.2d at 825), that requiring a deduction for federal obligations would nullify share taxes, and that the Board of Governors of the Federal Reserve had so reported to Congress.

Repeals by implication are disfavored. When Courts are confronted with statutes capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective. *Administrator, Federal Aviation Administration, et al. v. Robertson, et al.*, 422 U.S. 255, 266-267 (1975). There certainly is no clearly expressed Congressional intention in this amendment to repeal 12 U.S.C. § 548 (Rev. Stat. 5219). Petitioners' reading of the meaning of the amendment would not allow both 31 U.S.C. § 742 (Rev. Stat. 3701) and 12 U.S.C. § 548 (Rev. Stat. 5219) to be effective, and thus cannot be sustained.

Although the briefs submitted by amici curiae in support of Petitioners suggest that a review of legislative history is unnecessary, this Court has said the meaning to be given to an Act of Congress can only be found by weighing every relevant aid to construction. *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

The aids to construction here include not only the legislative history of the 1959 amendment, but also the history of the 1969 amendment to 12 U.S.C. § 548 (Rev.Stat.5219), since it indicates the Congressional state of mind concerning a statute which under Petitioners' theories was repealed by implication ten years earlier.

III. LEGISLATIVE HISTORY

In Senate Report No. 909, 1959 U. S. CODE CONG. & AD. NEWS 2769, it was noted that § 3701

> . . . now provides that, *except as otherwise provided by law*, all stocks, bonds, Treasury notes and other obligations of the United States are to be exempt from taxation . . . (p. 2777) (emphasis added).

Thus, the controverted phrase existed as part of the existing law in the belief of Congress, and Congress made no attempt to delete it.

The report continues and notes that the "new sentence makes it clear that the exemption *now provided* by Section 3701 extends to every form of taxation . . ." (p. 2777) (emphasis added). When read with the above paragraph, it is apparent that "now provided" refers to the pre-amendment section, which "now provides" an exemption which the new sentence only makes clear.

This interpretation is confirmed by an earlier section of the report (1959 U. S. CODE CONG. & AD. NEWS 2773) which discusses the Amendment and which is entitled:

> D. *CLARIFYING* EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION. (emphasis added)

This interpretation is further reinforced by the statement of Congressman Mills that the bill is "a reaffirmation of the exemption from certain local taxes on Federal Bonds." 105 Cong. Rec. 18157 (1959). Petitioners fail to cite anything in the legislative history concerning this section of the bill which contradicts or disputes this interpretation, but rather rely on implication from discussions of other parts of the bill. About such a reliance, this Court stated:

> However, this amendment served only to clarify the original provisions for exemption, without more. Unless resort is had to enlargement by implication, this exemption means only that the proceeds or benefits of a War Risk Policy are exempt from taxation. Exemption from taxation does not rest upon implication. *United States Trust Company v. Helvering*, 307 U.S. 57, 59-60 (1939).

The only fair reading of the legislative history of the bill is that the amendment was aimed at one state — Idaho — and one tax — a personal income tax (see 1959 U. S. CODE CONG. & AD. NEWS 2773), and that Congress had no intent to repeal the share tax existing in 12 U.S.C. § 548 (Rev.Stat. 5219). The Secretary of the Treasury made the purpose even clearer in his statement to the Ways and Means Committee.[4]

Petitioners claim that Congressional silence on the subject of the share tax in 1959 is unimportant, citing *Scripps-Howard Radio, Inc. v. Federal Communications Comm.*, 316 U.S. 4 (1942). In *Scripps-Howard*, as opposed to the instant case, the silence was being urged as support for a theory that a long-standing law or policy had been *changed*. By contrast, in the case before this Court, the silence of Congress implies that the long-standing share tax had been left *unchanged*.

The difference is significant. In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court discussed the significance of Congressional silence where, as here, the Court was asked to overturn a rule which had been in force for a significant period of time, and which had been the subject of a century of legislative and administrative acts and judicial decisions. In this case, the Court said:

> We are asked to conclude that Congress . . . without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change . . . has radically modified a statute always theretofore maintained and

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[4] *Hearings before the Committee on Ways and Means of the House of Representatives*, Eighty-Sixth Congress, First Session, June 10, 11, and 12, 1959. Secretary Anderson's statement is set out in full in Respondents' Reply to Brief for the United States as Amicus Curiae, p. 4-6, on file herein.

> considered as of great importance. It is inconceivable that a rule . . . welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion. (p. 194).

While the issue here may be of some lesser absolute importance than the citizenship question raised in *Ozawa*, nevertheless, it is of great importance to the State and local taxing authorities and to the shareholders seeking to escape this tax. It is equally unlikely here that Congress would have, without the barest mention or debate, intended to overturn a doctrine "firmly embedded in the law" for a century, which had been judicially interpreted on many occasions, and which was of vital importance to local cities, counties, school and hospital districts, and other entities which would lose millions of dollars yearly from the repeal of the tax. Also see *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) where this Court said:

> The reports and debates leading up to the 1972 amendments contained not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely . . . at the very least, one would expect some hint of a purpose to work such a change, but there was none. (p. 267-268)

As noted above, silence is not the only evidence to consider here. All of the pertinent legislative history indicates the amendment was meant to clarify, not change. Additionally, the history of the 1969 amendment (Act of Dec. 24, 1969, Pub. L. No. 91-156, 83 Stat. 434) to 12 U.S.C. § 548, as demonstrated below, shows a continuing concern for local taxing powers which would not have been necessary had Congress taken those powers away in 1959.

There was no need for the 1969 Amendment if 12 U.S.C. § 548 was repealed ten years earlier by the 1959 Amendment to 31 U.S.C. § 742. The 1969 Amendment to 12 U.S.C. § 548 (Rev.Stat. 5219) expanded the Congressional consent for the taxation of national banks. Senate Report No. 91-530, 1969 U.S. CODE CONG. & AD. NEWS 1594, prepared by the Committee on Banking and Currency, noted that with regard to intangible personal property taxes on banks, there was concern about the amendment to Rev.Stat. 5219 because of ". . . uncertainty about the magnitude of the impact of the sudden imposition of *additional* such taxes on the banking systems." (p. 1596) (emphasis added). Therefore, there was in effect in the interim period from 1969-1973 a temporary prohibition against new intangible property taxes, but the report states:

> The committee wants it clearly understood that the prohibition . . . is not a prohibition against the *continued* imposition of any tax under the authority of Section 5219 of the Revised Statutes as it now reads. (p. 1596) (emphasis added).

The interim period was to allow those States

> such as Missouri, in which the State legislation concerning taxation of banks has made specific reference to Section 5219 of the Revised Statutes. (p. 1597),

time to ". . . effect the necessary state statutory changes." (p. 1597), because the committee was concerned that if those particular states were not given time to end the specific references to 5219,

> . . . the taxing authority under existing State legislation might in some way be impaired. (p. 1597).

Since Texas had no such reference to Rev.Stat. 5219, it was not affected by this interim provision.

The temporary amendment left the present authority intact while adding a permanent amendment to go into effect January 1, 1972, which provides as follows:

> For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located. 12 U.S.C. § 548 (1969).

Petitioners have not directed the Court's attention to any decision rendered before 1969 which held the bank stock tax impermissible, unless United States securities owned by the bank are subtracted from the value of the stock owned by the shareholder. Therefore, at the time of the passage of the 1969 amendment to 12 U.S.C. § 548 (Rev.Stat. 5219) (which at the time by its terms specifically permitted the imposition of the bank stock tax), it was manifestly contemplated by Congress that the new taxing authority would be an addition to the already-present authority to tax bank stock. The Senate Committee noted that the 1969 temporary amendment dealt with ". . . expanded taxing authority being immediately granted." 1969 U.S. CODE CONG. & AD. NEWS 1597. The Committee further noted that under the 1972 amendment (which stated the current law) the major substantial change ". . . is to remove specifically the prohibition against intangible personal property taxes which might be levied by the States on National banks whose principal offices are located within that State." (p. 1597).

The purpose of the amendment was clearly articulated by Senator Tower who, while explaining why he would vote for the bill, stated that:

> However, the necessity for new sources of State revenue and the unpopularity of the presently unwarranted im-

munities of national banks militate for rapid action to clear national banks for new taxes such as sales taxes, documentary taxes, and motor vehicle taxes. The 1970 provision does this adequately, and hence I support the conference report in that respect. 115 CONG. REC. 38634 (December 12, 1969).

While discussing this same bill in the Senate on November 21, 1969, Senator Proxmire states as follows:

> The purpose of the bill is to try to give the States an opportunity to tax the banks in those States on an equitable basis.
>
> This is hard to do because the present law, Section 5219 of the Revised Statutes, currently provides a list of taxes which can be imposed on national banks by States or their political subdivisions. The list is explicit and contains a number of detailed and cumbersome exceptions. The courts have repeatedly ruled that the taxes specified in Section 5219 are exclusive; that is, they are the only taxes that can be imposed by a State government on a national bank.
>
> This method of restricting State taxation of national banks had its inception approximately 100 years ago.
>
> * * *
>
> There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government, and, as such, hold a unique and distinct position from that of other institutions. Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded state banks . . .

> Incidentally, the committee is in full accordance with the principle that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure. Accordingly, the committee agrees in principle with the objective of the bill passed by the House of Representatives. 115 CONG. REG. 35399 (November 21, 1969).

These discussions make no sense at all if Congress, in 1959, effectively abolished the very tax being discussed. Common sense says that somewhere, someone would have noted or mentioned that the taxes under discussion had been eliminated ten years previously. If such discussions exist, Petitioners have yet to point them out.

As stated in *United States v. Dickerson*, 310 U.S. 554, 561 (1940), a change in statutory language may infer a change of purpose, but such inference is only "a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence . . ." The evidence laid out herein is persuasive that Congress did not, by the innocuous 1959 amendment to 31 U.S.C. § 742, intend to deprive states of a taxing authority they had held for nearly a century, and thereby take away from towns and schools millions of dollars in taxes which they had previously collected each year.

Some 40% of the States tax either bank stock or other corporate stock or both. Petitioners' theories would effectively take away from those States those various taxes, since each taxing authority would be put to the task of determining each kind of corporate stock their taxpayers owned, and then would have to further determine for each such stock whether the company in question owned any federal obligations, and then make the necessary calculations to make deductions for such obligations. It is inconceivable

that a tax assessor could as a practical matter administer such a tax. It is inconceivable that Congress intended, without so stating, that all of the affected States should lose these tax revenues.

Perhaps the application of the legislative and judicial history of our questions was best summed up by Professor Edward L. Symons, Jr.[5], as follows:

> Since the famous case of *M'Culloch v. Maryland*,[1] involving Maryland's tax on bank notes issue operations of the Second Bank of the United States, the U. S. Supreme Court has considered the constitutional and statutory parameters of the state taxation of banks many times. The cases generally have involved the related questions of whether and to what extent states can tax either (1) federal instrumentalities — means used by Congress to exercise its powers — or (2) federal debt obligations — U.S. Treasury bills, notes, and bonds. A rich history has developed, spreading over a century and a half of congressional and Supreme Court elaborations. *Yet a spate of recent bank taxation cases suggest that the litigating banks, if not the courts deciding most of the cases, have either an innate indifference to, or a lack of awareness of, this history.*[2] (emphasis added) (footnotes deleted) (p. 817)

As to the effect of the 1959 amendment of 31 U.S.C. § 742 on the Supreme Court decisions and 12 U.S.C. § 548, Professor Symons noted in his article that:

> In response to the attempt to tax individual holdings of federal obligations, in 1959 Congress amended Section 742 to add the second sentence, expressly prohibiting indirect taxation. But neither the amendment nor its

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[5]Symons, *State Taxation of Banks: Federal Limitations*, 99 BANKING LAW JOURNAL 817 (1982).

legislative history contains any hint of overruling the U. S. Supreme Court cases upholding bank share or excise taxes on banks holding federal obligations. Rather the amendment and its history not only reaffirm every aspect of the case law elaborations of Section 742, but also are devoid of any intent to overrule any aspect of Section 548 case law. This is made clear by several factors.

First, the 1959 amendment expressly excepts franchise taxes and succession taxes from the prohibition of indirect taxation, thereby adopting the U.S. Supreme Court cases recognizing an independent state basis of taxation founded on state-granted privileges, even though the measure of the tax includes federal obligations, arguably taxing them indirectly. Second, there is good reason for both the legislative history and the amendment to Section 742 being silent on the taxation of other property rights, such as bank shares, that are not themselves federal obligations. At the time of the 1959 amendment, bank taxation was governed by language in Section 548 specifically providing for bank shares taxation. It would have been redundant to expressly reaffirm Section 548's separate property taxation in the amendment to Section 742.

Further, the amendment to Section 742 was but a small part of a bill written primarily to raise the interest ceiling on U.S. Savings Bonds and to change other aspects of federal debt management. Upon a complete reading of the legislative history, what references there are to banks serve to emphasize the absence of any thoughts about revising bank taxation. The references evidence only criticism of financial institutions for holding too many state tax-exempt obligations and too few federal obligations. The fact that banks were discussed, but with a different focus, reinforces the suggestion that no change was intended in 1959 with regard to permissible methods of bank taxation. Moreover, the fact

that no claim of implied amendment was made for almost two decades, until the aberrational case of *Montana Bankers Association v. Montana Department of Revenue* in 1978, suggests that an implied amendment had not occurred. (p. 834-835)

IV. INTERPRETATION OF A POLICY OR STATE STATUTE BY THE LOCAL BODY AND/OR STATE COURTS IS BINDING UPON THE FEDERAL COURTS.

The Texas Court in *Bank of Texas v. John Childs*, 615 S.W.2d 810 (Tex. Civ. App.-Dallas 1981, writ ref'd n.r.e.) properly rejected the Montana decision (*Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (1978). The Montana decision (a 3-2 vote) states (p. 911) that the issue presented is whether under Montana law a Montana bank is entitled to deduct United States obligations owned by it on assessment day, clearly recognizing that the Montana tax was a tax on banks and their assets. With such a State Court interpretation of the State law, this decision may be in accord with Federal Court decisions that the bank's assets (Federal Securities) may not be taxed. There was a factual difference in the Montana statute and the Texas statute. The Montana statute made the banking corporation liable to the State for the payment assessed against the shares. No liability was imposed on the shareholder, although the statute did authorize the banking corporation to recover from the owners of the shares any taxes paid on the shares and gave the banking corporation a lien to secure the payment. The Montana statute provided in this regard as follows:

> The bank or banking corporation in which such shares are owned shall be liable for the payment of taxes

assessed against such shares, and such taxes shall be payable by and may be collected from such bank or banking corporation in the same manner and under the same penalties as other taxes; provided that such bank or banking corporation may recover from such owners shares any taxes so paid on such shares, and shall have a lien therefor upon such shares and upon any dividends accrued or to accrue thereon. Section 84-4605, R.C.M. 1947.

The Texas law, on the other hand, is a tax on shareholders by statute (Tex. Rev. Civ. Stat. Ann. art. 7166) (Vernon) and by case law (*City of Marshall v. First State Bank of Marshall*, 127 S.W. 1083, 1086 (Tex. App. 1910, writ ref'd). The tax assessor has no power to collect the tax from the bank, since the tax is not on the bank's assets, be they United States obligations or otherwise.

The law of the State of Texas has remained the same and is not affected by the federal statute which permits a corporation that pays a tax imposed on a shareholder on his interest as a shareholder to deduct the amount of tax that the corporation paid but was owed (and not deducted) by the shareholder. See n.2 herein for text of 26 U.S.C. § 164(e).

The holdings of our courts have been so emphatic that it is the shareholder who owes the property tax on his shares and that it is the shareholder's property that is taxed, that confusion now exists in our federal court decisions as to whether or not the bank and/or the shareholder must pay income tax when there is an IRS refund connected with a deduction of property taxes (bank shares) voluntarily paid by the bank to the State in accordance with 26 U.S.C. § 164(e). *Hillsboro National Bank v. Commissioner of Internal Revenue*, 641 F.2d 529 (7th Cir. 1981), cert, granted 50 LW 3565 (1982) (argued Nov. 1, 1982).

Even in tax cases, state courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so judging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the Federal Constitution "that we have power to protect or enforce the federal rights." *Greenough, et al. v. Tax Assessors of City of Newport, et al.*, 331 U.S. 486, 497 (1947).

The State Court held in *Bank of Texas* that "the County properly assessed the tax on the shares in question without any allowance or deduction for federal securities held by the bank." J.A. 203-204 (615 S.W.2d 826). This holding, therefore, has construed the state statute, which provides for bank shares to be assessed based upon the "actual cash value" of the stock less the value of the proportionate amount per share of the real estate owned by the bank, not to "require" that the amount of Federal obligations be considered in the computation of the tax.

The decision of the state court in construing a state statute is binding upon the federal courts. In *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976), this Court stated that:

> We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State. The rule holds true where other interpretations may even be preferable to the State interpretation.

This Court has recently affirmed the rule in considering an interpretation of a school board policy in *Board of Education of Rogers, Ark. v. McCluskey*, 102 S.Ct. 3469, —U.S.— (1982), and specifically held that:

> In any case, even if the District Court's and the Court of Appeals' views of § 11 struck us as clearly preferable to the Board's — which they do not — the Board's interpretation of its regulation controls under *Wood v. Strickland.*

In our cases, not only have the local tax assessors and their governing bodies interpreted the Texas Statute not to require consideration of or even know of Federal Securities being owned by the bank in assessing the tax, but the Texas Courts have held likewise.

Although this Court remanded *Schuylkill Trust v. Commonwealth of Pennsylvania*, 296 U.S. 113 (1935), the case was again considered by the Supreme Court in the 1938 case of *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506 (1938). In this case, this Court held that a tax on the shares of the trust company was not a tax on the assets of the company, even though the value of the shares was measured by the capital, surplus, and undivided profits. In that case, the Court held:

> As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The State courts, and the local federal court, have held the imposition a tax upon the shares. The history of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion. We are of the opinion that the tax is one upon the shares as such and not upon the assets of the company. (p. 512).

CONCLUSION

Prior to 1959, the States were free to tax the full value of bank stock, and the exemption from taxation of United States obligations had no effect on such right. The 1959

amendment to 31 U.S.C. § 742 did not change such rule. The language of the amendment and the legislative history of the amendment and of other related legislation affirmatively demonstrate that Congress intended no sweeping changes to such statute, but sought only to clarify it because of an Idaho income tax statute. The tax on bank stock imposed in Texas on the shareholder does not violate 31 U.S.C. § 742 (Rev. Stat. 3701) and the decision of the lower court should be affirmed, and Tex. Rev. Civ. Stat. Ann. art, 7166 (Vernon) declared to be in compliance with 12 U.S.C. § 548 (Rev. Stat. 3701) and all other applicable United States statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE IN CAUSE NO. 81-1717

I, Earl Luna, counsel of record for Respondents, Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its Members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District, and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served three copies of Respondents' Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its Members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, Brief on each of the attorneys for the several parties hereto, by personal delivery or mailing of three copies with first-class postage prepaid, addressed to counsel of record at the following addresses:

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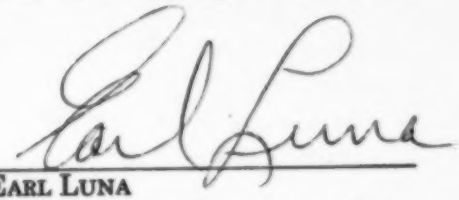
It is further certified that all parties required to be served have been served, and that the list of both parties is as set forth above.



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Appendix

APPENDIX

NATIONAL BANK SHARES

§ 548. State taxation

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided*,

however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.

§ 11.02. Intangible Personal Property

(a) Except as provided by Subsection (b) of this section, intangible personal property is not taxable.

(b) Stock in a banking corporation, intangible property of an unincorporated bank, intangible property of a transportation business listed in Subchapter A, Chapter 24 of this code,[1] and intangible property governed by Article 4.01, Insurance Code, or by Section 11.09, Texas Savings and Loan Act,[2] are taxable as provided by law, unless exempt by law, if this state has jurisdiction to tax those intangibles.

(c) This state has jurisdiction to tax intangible personal property, other than stock in a banking corporation, if the property is:

(1) owned by a resident of this state; or

(2) located in this state for business purposes.

(d) This state has jurisdiction to tax stock in a banking corporation that is incorporated in this state or, if the bank is a national bank, is located in this state.

§ 23.11 Banking Corporation

(a) The stock of a banking corporation that is located in this state is appraised by subtracting the market value of the real property owned by the bank from the actual cash value of the bank's stock.

(b) Real property owned by a banking corporation subject to this section is appraised in the same manner as other real property, but a banking corporation's personal property is not subject to taxation except as provided by Section 25.15 of this code.

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[1]Section 24.01 et seq.

[2]Vernon's Ann.Civ.St. art. 852a, § 11.09.

Supplemental Respondent's Brief

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,

No. 81-1717

In The

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners

v.

DALLAS COUNTY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

SUPPLEMENTAL BRIEF FOR RESPONDENTS DALLAS COUNTY, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

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March 21, 1983

QUESTION PRESENTED[1]

1. **Whether 31 U.S.C. §742 (Rev.Stat.3701) requires that United States obligations owned by a banking corporation be deducted from the cash value of an individual shareholder's shares in the banking corporation in order for a state ad valorem tax on the individual shareholder's stock to be valid.**

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[1]Respondents, being dissatisfied with the Petitioners' presentation of the Question Presented, have rephrased the question so as to more clearly and accurately state same.

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No. 81-1717

In The

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners

v.

DALLAS COUNTY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

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STATEMENT OF THE CASE

These Respondents have stated the case in their Brief and therefore will not repeat it unnecessarily here.

SUMMARY OF ARGUMENT

The legal incidence of the tax imposed by Tex.Rev.Stat. Ann.art.7166 (Vernon) falls upon shareholders in banks, not upon the United States government or upon owners or purchasers of United States obligations. Therefore, under this Court's recent ruling in *Memphis Bank and Trust Company v. Garner*, ——U.S.——, 103 S.Ct. 692 (1983), this tax is not in violation of 31 U.S.C. §742.

ARGUMENT

This Court has recently had occasion to consider the meaning of 31 U.S.C. §742 in the decision of *Memphis Bank and Trust Company v. Garner*, ——U.S.——, 103 S.Ct. 692 (1983).

In that case, this Court noted (103 S.Ct. at 696) that §742 was principally a restatement of the constitutional rule immunizing United States obligations from taxation.

Where, as in the case at bar, the legal incidence of the tax does not fall on the Federal Government, but is on the separate property interest of the stockholders, such a tax is permissible. *Memphis Bank & Trust v. Garner*, supra. The authorities are in complete harmony on the question of a share of stock being a separate property interest distinct from the property of the corporation. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866). No decision of this Court has ever held otherwise.

It is clear from the language itself of Tex.Rev.Civ.Stat. Ann.art. 7166 (Vernon) that the legal incidence of the tax does not fall on the Federal government. Indeed, the legal incidence does not even fall on the owner of the United States obligations which Petitioners claim are the subject of

taxation. Instead, the legal incidence of the tax falls on shareholders in banks based on the value of their shares.

Therefore, under the rule stated in *Memphis Bank and Trust Company*, supra, the tax in question (the legal incidence of which falls on bank shareholders) does not violate the constitutional immunity expressed in 31 U.S.C. §742.

This case is also important in showing the true language of 31 U.S.C. §742. Petitioners have claimed that the opening phrase "Except as otherwise provided by law", although a part of the Code section, is not a part of the law. Their claim is based upon the argument that such phrase does not appear in the Revised Statute (§3701) from which the Code section derives. Since the Code provides (THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA Enacting Clause, §2) that prior unrepealed laws inconsistent with the Code prevail, Petitioners have argued that the phrase is not part of the law. Of course, such phrase is only an explicit statement of what is a normal rule of construction: that is, that laws on the same subject must be read together, and each regarded as effective, absent clearly expressed congressional intent to the contrary. *Morton v. Mancari*, 417 U.S. 535 (1974). The Petitioners have cited no law in conflict with the Code and, therefore, the Code stands as enacted by Congress in 1926.

This Court recognized the phrase as part of the law, *Memphis Bank and Trust Company v. Garner*, supra, as it has in the past, *Society for Saving in the City of Cleveland v. Bowers*, 349 U.S. 143 (1955). The phrase in question is not in conflict with R.S. §3701 and is therefore a proper part of 31 U.S.C. §742. *Memphis Bank and Trust Company*, supra, effectively confirms the Court of Appeals recognition of the phrase in this case. *Bank of Texas, et al v. John Childs*,

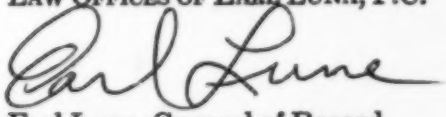
et al., 615 S.W.2d 810 (Tex.Civ.App. - Dallas, 1981, writ ref'd n.r.e.)

CONCLUSION

The tax on bank stock imposed in Texas on the shareholder does not violate 31 U.S.C. §742. The decision of the lower court should be affirmed, and Tex.Rev.Civ.Stat.Ann. art. 7166 declared to be in compliance with all applicable United States statutes.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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CERTIFICATE OF SERVICE IN CAUSE NO. 81-1717

I, Earl Luna, counsel of record for Respondents, Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its Members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District, and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served three copies of Respondents' Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, the Board of Equalization of Dallas County, and its Members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, Supplemental Brief on each of the attorneys for the several parties hereto, by personal delivery or mailing of three copies with first-class postage prepaid, addressed to counsel of record at the following addresses:

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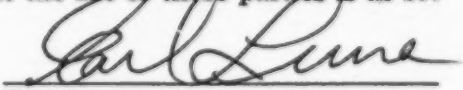

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Respondent's Brief

2

Supreme Court, U.S.
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NO. 81-1717

IN THE

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OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners,

VS.

DALLAS COUNTY, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF FOR RESPONDENTS THE CITY OF DALLAS, MAX NOLLER, THE DALLAS INDEPENDENT SCHOOL DISTRICT AND, THE BOARD OF EQUALIZATION OF THE CITY OF DALLAS, AND DALLAS INDEPENDENT SCHOOL DISTRICT

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QUESTION PRESENTED

Whether a state property tax on bank shares computed on the actual cash value of the shares less a proportionate amount per share at which the bank's real estate is assessed, without any deduction for tax-exempt United States obligations owned by the bank, violates 31 U.S.C. §742?

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NO. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
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Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

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BRIEF FOR RESPONDENTS THE CITY OF DALLAS, MAX NOLLER, THE DALLAS INDEPENDENT SCHOOL DISTRICT AND, THE BOARD OF EQUALIZATION OF THE CITY OF DALLAS, AND DALLAS INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Joint Appendix (App.) 164. The first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at App. 174. The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at App. 198.

The summary opinion of the court below in Cause No. 20915, relying exclusively on the opinion in Cause No. 20660, was not reported and is reproduced at App. 127. Respondents the City of Dallas and Dallas Independent School District were parties in Cause No. 20915 and Amici Curiae in Cause No. 20660.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' Brief.

STATUTORY PROVISIONS

Rev. Stat. 3701 (31 U.S.C. §742)

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Rev. Stat. 3701 (31 U.S.C. §742) as amended in 1959

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Rev. Stat. 5219 (12 U.S.C. §548)
before its amendment in 1969

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom

in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in the case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided*, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own law or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes divi-

dends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. §5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.

Rev. Stat. 5219 (12 U.S.C. §548)
after its amendment in 1969

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960)

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be in a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

Banking corporations in the State of Texas and their shareholders are taxed according to Tex.Rev.Civ.Stat.Ann. art. 7166 (Vernon 1960). The bank itself is taxed only upon its real property, while its shareholder's are taxed upon the value of their shares. Real property of the bank is deducted

proportionately from the value of the shareholder's shares. (App. 32).

The share tax in Cause No. 20915 was assessed upon the equity capital as designated on each bank's statement of condition for December 31, 1979. (App. 31).

Petitioners sued for injunctive and declaratory relief on the grounds that this method of taxation violates federal law by including federal obligations in the computation of the tax. (App. 8). The Courts below found that there was no violation of federal law and Petitioners now seek a writ of certiorari from this Court to review those judgments. (App. 127-130, 174-204).

SUMMARY OF THE ARGUMENT

There is no question that Congress intends the shares of national banks to be subject to state and local taxation. A tax on bank shares which does not exclude federal obligations in its computation is specifically authorized under the provisions of Rev. Stat. 5219.[1] The Supreme Court has consistently construed this provision as authorizing states to tax "all of the shares" of national banks, without deducting federal obligations.

The general exemption statute, Rev. Stat. 3701[2] does not control the taxation of national banks. The taxation of bank-

[1]Act of June 3, 1864 ch. 106, §41, 13 Stat. 99, 111 (the National Bank Act); certified as Section 5219 of the Revised Statutes of the United States and later embodied in 12 U.S.C. §548. From 1864 until 1969, this Statute provided that "all of the shares" of national banking associations are subject to local taxation. In 1969, the statute was revised. Act of Dec. 24, 1969, Pub. L.No. 91-156 § 1(a), 2(a), 83 Stat. *See supra* text p. 4. The legislative history of this amendment indicates that the revision was not intended to alter the application of the bank share tax as previously enacted. *See infra* text pp. 12-13.

[2]Originally enacted by Act of Feb. 25, 1862, ch. 33, §2, 12. Stat. 346 and later amended by Act of Sept. 22, 1959, Pub. L.No. 86-346, §105(a), 73 Stat. 622 and embodied in 31 U.S.C. §742.

shares is already regulated by Congress in Rev. Stat. 5219 and is therefore not subject to the provisions of Rev. Stat. 3701.

ARGUMENT

The Taxation of Bankshares Does Not Violate Rev. Stat. 3701 (31 U.S.C. §742)

Revised Statute 5219 in Its Historical Context.

Both federal statutes under consideration in this cause were first enacted at a time when Congress was concerned with a number of constitutional and economic issues. In the early 1860's, while Congress was trying to stabilize the economy and unify the nation under one government, the balance between federal and state's rights was at the forefront of many of their decisions.

In 1864, when Congress was debating H.R. 395, 38th Cong., 1st Sess. §41 (1864), which authorized the taxation of national bankshares, it was aware that it had previously passed legislation for the issuance of federal bonds which specifically exempted those bonds from state taxation.[3] The Supreme Court had already confirmed the supremacy of the federal government in regard to the state taxation of federal instrumentalities. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 579 (1819); *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829).

Congress therefore, cautiously undertook to subject national bankshares to state and local taxation. When the Senate Committee on finance presented its proposed amendment to section 41 of H.R. 395, 38th Cong., 1st Sess. (1864),[4] some

[3]Cong. Globe, 38th Cong., 1st Sess. 2129 (1864) (Remarks of Senator Sumner).

[4]The provisions relating to state taxation are the following: "... *Provided*, That nothing in this act shall be construed to prevent the market value of the shares in any of the said associations, held by any person or body-corporate, from being included in the valuation of the personal property of such person or corporation in the assess-

senators were alarmed, because in their opinions, the committee amendment provided no limitation on the state taxation of the bankshares. Cong. Globe, 38th Cong., 1st Sess. 1871 (1864) (Remarks of Senator Chandler)[5].

Senator Fessenden from Maine, a member of the Senate Committee on Finance and a proponent of the committee amendment recognized that a deduction of federal obligations from the taxation of bankshares, would in effect vitiate the tax.[6]

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ment of all taxes imposed by or under State authority for State or other purposes, but not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of each state; and all the remedies provided by state laws for the collection of such taxes shall be applicable thereto: *Provided* also, that nothing in this act exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed." Cong. Globe, 38th Cong., 1st Sess. 1871 (1864).

[5]Senator Chandler and his colleague Senator Pomeroy were in favor of the following amendment which was similar to the bill as it had been passed in the House, in lieu of the Committee Amendment:

> "... *Provided,* That nothing in this act shall be construed as exempting the capital stock of an association, beyond the amount invested in United States bonds and deposited with the Treasurer of the United States as part of its capital or as security for its circulatory notes, from being subject to the same rate of State and municipal taxation as is imposed upon other personal property in the State or city or town in which the association is located."

Cong. Globe, 38th Cong., 1st Sess. 1889 (1864).

[6]The senator described the problem in the following comment: "By a proviso to the section as it came to us from the House, they might invest the whole amount of their capital stock in United States bonds, and take out their bills; but they need not use those bills unless they choose to do so. They have got their bonds; they deposited them and take out their bills to the whole amount of the bank capital; but they do not use their bills, and in that way they get the whole amount of their bank capital freed from taxation. The House provision amounts to just nothing at all, as anybody will see on looking at it. It is delusive, therefore, in its character; and if the banks chose to exert that power, which they would be very likely

The Senate debates demonstrate that Congress was aware that its permission to tax the shares of national banks afforded by this provision, would not require the exclusion of United States securities, unless otherwise specified in the statute itself. *See supra* notes 4 & 5.

The dispute currently before this Court has been ongoing since the enactment of the statute in 1864. For over 100 years, banks have been litigating the identical issues they now bring before this Court. They have been seeking to do exactly what Senator Fessenden feared, to secure the deduction of their federal obligations in order to sequester millions of dollars of assets from state and local taxation.

Van Allen v. The Assessors, 70 U.S. (3 Wall.) 573 (1866) was the first case in which there was an attempt to eliminate federal obligations owned by the bank from a state tax on bank shareholders. Contrary to Petitioners' assertion (Pet. Brief 10), the *Van Allen* Court did not rely solely on the shareholder-corporation distinction in finding that the exclusion of federal obligations from a bank share tax was not required. The Court also relied upon another independent ground in reaching its decision, that Congress has paramount authority over the taxation of an instrumentality of the

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to do, because they get six percent on the bonds when they are deposited, it would amount precisely to this: that they would pay no taxes on their whole capital. That it was desirable to avoid." Cong. Globe, 38th Cong., 1st Sess. 1872 (1864).

There was a great deal of discussion on the subject, some Senators wanted only a federal tax on the stocks of national banks, some, like Senator Chandler, supported state taxation only to the extent that it did not include bonds of the United States, yet the final bill enacted provided that "all of the shares" were subject to state taxation without mentioning any exclusion of federal obligations. Act of June 3, 1864, ch. 106, Section 41, 13 Stat. 99, 111.

federal government, and may subject this instrumentality to state taxation.[7]

After the Court determined that Congress had subjected bankshares to state taxation, it then discussed the extent to which this state authority reached, and concluded that the whole interest of the share was the interest which Congress designed to be taxed, as indicated by the language "all of the shares". The Court found that the statute contained no provision requiring the exclusion of federal obligations from the computation of the share tax and concluded that Congress would have enacted such a provision had it intended those obligations to be deducted.[8] This reasoning is consistent with the 1864 Senate debates over the share tax provision. *See supra* text pp. 7-9 and accompanying notes 3-6. As Petitioners have so correctly pointed out in their brief, courts are "obliged to give effect, if possible, to every word Congress used" in enacting a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); (Pet. Brief 17). The *Van Allen* court gave effect to every word of the statute and correctly held that the tax extends

[7] The last question addressed in the opinion was "... [H]as Congress legislated in respect to these associations, *so as to leave the shares of the stockholders subject to state taxation?*" *Van Allen*, 235. [Emphasis added].

[8] "In all these instances it is manifest that the term as used, means the entire interest of the shareholder; and it would be singular if in the use of the term in the connection of state taxation, Congress intended a totally different meaning, without any indication of such intent.

"This is an answer to the argument that the term, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the state assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction." Id. at 603.

to the entire share without deducting federal obligations. This construction of the statute is reflected in the Senate debates reported at Cong. Globe, 38th Cong., 1st Sess. 1871 *et seq.* (1864).

A number of decisions since 1866 support the consent described in *Van Allen.*[9]

[9]While discussing Rev. Stat. 5219, the Court in *People of the State of New York v. Weaver,* 100 U.S. 539 (1880) wrote, "That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bankshares, is abundantly established by the cases of *McCulloch v. Maryland,* 4 Wheat., 316; *Osborn v. Bk,* 9 Wheat., 738; *Weston v. Charleston,* 2 Pet., 449.

"As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital."

In *Ceveland Trust Company v. Lander,* 184 U.S. 111, 114 (1902), Justice McKenna, discussing the *Van Allen* case said, "The validity of the statute was sustained, and interpreting it, the court said that it authorized the taxation of such shares, and shares were defined to be the whole interest of the holder without dimunition on account of the kind of property which constituted the capital stock of the bank." In 1923, Justice Van DeVanter in his opinion in *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 106 (1923) wrote, "It is settled that the relation of the national banks to the United States, and the purposes intended to be subserved by their creation, are such that there can be no taxation, by or under state authority, of the banks, their property, or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation." [citations omitted]

"The Congressional consent and the terms and restrictions accompanying it as existing in the time of this assessment are found in Rev. Stat. §5219 . . ."

Because the "consent concept", is directly related to the shares of the banks, it can be easily confused with the difference between the shareholder's interest and the bank's interest which was also discussed in *Van Allen.* Justice Harlan in *Society for Savings v. Bowers,* 349 U.S. 143, 147-148 (1955) acknowledged that the shareholder corporation distinction was not the only principal relied upon by the *Van Allen* court, "This doctrine had its origin in cases involving national bank stock. There, congressional consent to state taxation of the stock of national banks, upon certain conditions, was held, over strong dissent, to permit such taxes to be assessed without

Although Revised Statute 5219 has been amended several times[10] since the *Van Allen* decision, Congress has never restricted the consent as construed by that Court. On any one of those occasions, Congress could have revoked its consent to the state taxation of "all of the" shares, but did not.

In 1969, the last time this statute was amended, Congress did not limit its existing authorizations to state taxation but rather broadened the authority of states in taxing banks.[11] The comments of the Senate Banking and Currency Committee, S.Rep. No. 91-530, 91st Cong. 1st Sess. (1969), provide that the changes included in the amendment during the interim period from 1969-1973, "... [are] not a prohibition against the continued imposition of any tax under the authority of Section 5219 of the Revised Statutes as it now reads."

Final application of the revision was not to become effective until 1973 and during the intervening years, Congress requested the Board of Governors of the Federal Reserve System to study the impact of these revisions.[12]

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the exclusion of federal obligations owned by the banks. [citations omitted] This result was reached *in part* on the theory that the stockholders' interest in a corporation represent a separate property interest from the corporation's ownership of its assets, so that a tax on the stockholders' interest is not a tax on the federal obligations which are included in the corporate property." [Emphasis added]

[10]Act of February 10, 1868, ch. 7, 15 Stat. 34; Act of Mar. 4, 1923, ch. 267, 42 Stat. 1499; Act of Mar. 25, 1926, ch. 88, 44 Stat. 223; Act of Dec. 24, 1969, Pub. L. No. 91-156, §§1(a), 2(a), 83 Stat. 434; Act of Dec. 22, 1971, Pub. L. No. 92-213, §4(a), 85 Stat. 775.

[11]The senate debates indicate that the new legislation was intended to extend the power of states to tax national banks. *See* 115 Cong. Rec. 38634 (1969) (Remarks of Senator Tower) and 115 Cong. Rec. 35399 (1969) (Remarks of Senator Proxmire).

[12]Act of Dec. 24, 1969, Pub. L. No. 91-156 §4, 85 Stat. 435.

The four volume study is extensive, reporting the impact of the state taxation of national banks.[13] It contains a summary of applicable statutes which includes the general exemption statute Rev.Stat. 3701 (31 U.S.C. §742), as amended in 1959 and presents a detailed history of Rev. Stat. 5219, which discusses the case law involving the deduction of federal obligations from the share tax. Although this report exhausts all aspects of the 1969 revisions of Rev. Stat. 5219, there is no mention of the economic impact of the deduction of federal obligations from the share tax. The report acknowledges the existence of the share tax, with no deduction for federal obligations, yet offers no recommendations for change.

The Board of Governors' study was made over 10 years after the 1959 amendment of Rev. Stat. 3701 (31 U.S.C. §742) was enacted.

Throughout the legislative history of Rev. Stat. 5219, there is no manifestation of congressional intent to allow banks shareholders to escape state taxation by excluding federal obligations from the computation of their tax. On the contrary, Congress has expressly expanded the authority of the states and local governments, in the taxation of banks.

Because the taxation of banks is already specifically prescribed in Rev. Stat. 5219 (12 U.S.C. §548), it does not follow that Congress would attempt to amend this statute by another, Rev. Stat. 3701 (31 U.S.C. §742).

> The 1959 Amendment to Rev. Stat. 3701, Is a Codification of Prior Judicial Constructions of the Immunity of Federal Obligations.

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[13]SENATE COMMITTEE ON BANKING, HOUSING & URBAN AFFAIRS; STATE & LOCAL TAXATION OF BANKS, 92nd Cong., 1st Sess., U.S. Senate, Parts I-IV, Study Under Pub.L. No. 91-156, 92-213.

Even before 1959, this Court had construed Rev. Stat. 3701 to prohibit the inclusion of federal obligation in a tax which considered them in its computation. *See, e.g. Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143 (1955); *New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals*, 448 U.S. 665 (1950); *Home Ins. Co. of New York v. People of New York*, 134 U.S. 594 (1889). Justice Harlan in *Society for Savings in the City of Cleveland v. Bowers*, *supra* at 144, recognized that the exemption of federal obligations embodied in Rev. Stat. 3701, applied to a tax which considered United States obligations in the computation of the tax. He wrote, "The rule has been carried forward to embrace indirect taxation of such obligations through their inclusion in a tax imposed on all of the property of a taxpayer." As early as 1929, this Court looked beyond legislative language to ascertain the actual effect of the tax.[14] In doing so, the Court has refused, with the exception of the bankshare tax, franchise taxes and inheritance taxes, to uphold a state tax which attempts to reach exempt obligations indirectly in the measure of the tax.

In *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, supra*, the Court found that a state tax levied against the intangible property of a corporation, which was computed from paid-up capital and surplus without deducting federal obligations on the interest thereon, was in violation of Rev. Stat. 3701. This decision, rendered nine years before the 1959 amendment, shows that the Court was concerned with the effect of the tax regardless of the language in

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[14]*The MacAllen Company v. Massachusetts*, 279 U.S. 620 (1929). Although the vitality of the holding in this case was questioned in *Tradesmen's National v. Oklahoma Tax Commission*, 309 U.S. 560, 568 (1940), this case provides a good example of the careful scrutiny which the Court uses in determining the actual nature of a tax.

which it was framed.[15] *See, Home Ins. Co. of New York v. People of the State of New York, supra.*

The General Statements included in the House Committee on Ways and Means[16] and the Senate Committee on Finance[17] Reports on the 1959 amendment of Rev. Stat. 3701, contain the following:

> "... Present law provides that obligations of the United States are to be exempt from taxation by or under state or local authority. *The Supreme Court has held that this includes the exemption of interest on United States obligations* from taxation by or under state or local authority..." [emphasis added].

Since Congress was aware that the Courts had required the exclusion of exempt obligations *considered* in the computation of a state tax, the 1959 amendment merely codified the existing rule. Even the Brief of American Bankers Association as amicus curiae, concedes that, "In all likelihood, Idaho's position would not have prevailed in court if it had been challenged." (Brief for American Bankers Association as Amicus Curiae 8).

There is nothing in the legislative history of this amendment to suggest that prior to 1959 Congress had interpreted the exemption, described in Rev. Stat. 3701, with the limited construction applied by Petitioners.

Petitioners argue that the specific exceptions of inheritance taxes and franchise taxes in Rev. Stat. 3701 somehow prove a Congressional intent to expand the law. (Pet. Brief

[15]Looking at the effect of the tax the Court said, "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds." *Supra* at 673.

[16]H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959).

[17]S. Rep. No. 909, 86th Cong., 1st Sess. (1959).

18). Just as the 1959 amendment embodied the judicial prohibition against taxes which considered federal bonds, it also embodied the franchise[18] and inheritance tax[19] exceptions which had been upheld by the Court prior to 1959.

It is clear from the opinions of this Court prior to 1959 that the immunity doctrine first enunciated in *McCulloch v. Maryland* and *Weston v. Charleston, supra*, extended to taxes which considered federal obligations in the computation of the tax. *See New Jersey Realty v. Div. of Tax Appeals, supra.* This concept is no different from that ultimately embodied in Rev. Stat. 3701 (31 U.S.C. §742) in 1959, yet it is a concept never applied to a true bank share tax, because that tax is controlled by a separate federal statute, Rev. Stat. 5219.

The 1959 Amendment to Rev. Stat. 3701 (31 U.S.C. §742) Does Not Control the Taxation of Bankshares.

Petitioners contend that the 1959 amendment to Rev. Stat. 3701 requires that federal obligations be deducted from a computation of the bank share tax. This argument assumes that Rev. Stat. 5219 has been amended or modified by Rev. Stat. 3701, the general exemption statute.

Revised statute 5219, specifically controls the taxation of national banks, while Rev. Stat. 3701 is a general exemption statute applicable to various types of federal obligations. *See, Smith v. Davis*, 323 U.S. 110 (1944). General rules of construction provide that in construing two statutes, the more specific statute takes precedence over the general one. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). In *Radzanower v.*

[18] *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492 (1956).

[19] *Plummer v. Colar*, 178 U.S. 115 (1900).

Touche Ross & Co., supra, 155-156, Justice Stewart explained the principles of statutory construction in a situation of this nature: "It is the basic principal of statutory construction that the statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering and more generalized spectrum. *'Where there is no clear intention otherwise,* a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.' *Morton v. Mancari,* 417 U.S. 535, 550-551 (1974)." [emphasis added].

The underlying principle is to uphold the act, when Congress was focusing on the particular problems relating to a specific area, unless an intent to do otherwise is clearly expressed.

The primary concern in construing an act of Congress, is to "construe the language so as to give effect to the intent of Congress." *United States of America, v. American Trucking Association,* 310 U.S. 534, 542 (1940).

While Congress was debating the 1959 amendment to Rev. Stat. 3701, it was also considering, H.R. 8159 entitled "An Act to amend the national banking laws, to clarify or eliminate ambiguities, to repeal certain laws which have become obsolete, and for other purposes." Act of Sept. 8, 1959, Pub. L. 86-230, 73 Stat. 457. This Act amounted to a comprehensive revision of the banking laws of the United States.

Although, many banking provisions were altered by the revision, Rev. Stat. 5219 was not affected. Having recently completed a sweeping review of the banking laws, Congress had ample opportunity to amend Rev. Stat. 5219, at that time and to require the exclusion of federal obligations from the taxation of bankshares if it had chosen

so to do; yet, there is no mention of Rev. Stat. 5219 or its application in the legislative history of Rev. Stat. 3701.

Rev. Stat. 5219 obviously governs the taxation of national banks. The exhaustive discussion of the legislative history of the 1959 amendment made by both Petitioners and Respondents underscores the absence of clear congressional intent to amend Rev. Stat. 5219 by Rev. Stat. 3701. Repeals by implication are not favored. *Morton v. Mancari, supra.*

On other occasions, when Congress has in fact amended the banking laws, such changes were specifically expressed in the language of the statute.[20] In 1936, when Congress determined that preferred shares in national banks owned by the Reconstruction Finance Corporation were not to be subject to the local tax provisions of Rev. Stat. 5219, it passed the Act of Mar. 20, 1936, ch. 160, 49 Stat. 1185, which specifically removed national bank stock owned by the Reconstruction Finance Corporation from state & local taxation. *Maricopa County v. Vally Nat. Bank*, 318 U.S. 361 (1943). The Court in *Maricopa* upheld the new statute and explained that prior to the Act of March 20, 1936, those bank shares were subject to the provisions of Rev. Stat. 5219, because Congress had consented to the taxation of shares of stock of national banks. *Id.* at 359. Under the new statute, the consent, previously conferred by Congress was expressly withdrawn. This action of Congress had been prompted by an earlier decision of the Supreme Court, *Baltimore Nat. Bank v. State Tax Commission*, 297 U.S. 209 (1936) where it had held those shares to be subject to Rev. Stat. 5219.

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[20]In 1964, Congress amended Rev. Stat. 5136, 12 U.S.C. §24. The amendment was contained in the Housing Act of 1964, Act of Sept. 2, 1964 Pub. L. No. 88-560, title vii, §701(c), 78 Stat. 800., which is not patently connected to the banking laws. However this revision refers to Rev. Stat. 5136 expressly in the text.

Congress has not manifested any intent to exclude federal obligations from the bankshare tax authorized under Rev. Stat. 5219, despite numerous judicial decisions holding the deduction is not required. The 1959 amendment cannot be interpreted to repeal or modify R.S. 5219 as judicially construed.

So long as the state taxation of bankshares is authorized by federal statute, both statutes must be construed together. Because of the complicated evolution of Rev. Stat. 5219, as it relates to those securities generally subject to the immunity of Rev. Stat. 3701, it is impossible to construe the relationship of these two statutes without studying their legislative histories and various judicial constructions. On looking at these two statutes, in light of all the relevant information, it becomes clear that in 1959 Congress, did not consciously intend to alter the bank share tax as it had been judicially construed since 1866.

Petitioners argue that the inclusion of these obligations in the computation of the share tax will make them less attractive investments and thereby place a burden on obligations of the federal government. (Pet. Brief 20). This same tax has been assessed since 1864 and of all the 50 bank petitioners only one bank did not own federal obligations (Pl. Ex. 32).

At trial, Petitioners could not even show that the obligations in question had been purchased from funds derived from the capital of the bank. Therefore they have not demonstrated that these obligations are in fact burdened by the share tax. (App. 69-79).

It is over 20 years since the amendment to Rev. Stat. 3701 was enacted, yet only at this late date have the bank shareholders and the Treasury Department allegedly discovered the intent of Congress.

Congress should determine whether its bonds are suffering by virtue of this tax. "The imposition of increased financial burden on the Government does not, by itself, vitiate a state tax." *United States v. Detroit*, 355 U.S. 466 (1958); *see also James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941).

It is a question of whether Congress intended to sequester millions of dollars from state and local government taxation. A deduction of these obligations from the bank share tax, will remove approximately eight million dollars of tax revenues from the City of Dallas and Dallas Independent School District per year. Throughout the legislative history and case law reviewed in relation to this tax, there is nothing to support a finding that such a result was intended by Congress.

The Decision Below

The opinion of the Court of Civil Appeals 5th Supreme Judicial District of Texas at Dallas correctly interpreted the opinion in *Van Allen*. (App. 183 *et seq)*. The Texas Court recognized that the bank share tax was based on the ground, "...that the Congress in authorizing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation." (App. 186). The Texas Court also found, "In discussing this ground, the [Van Allen] court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares saying that although Congress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act." (App. 186).

The Texas Court of Civil Appeals applied the rules of judicial construction, announced by this Court in determining

that the general exemption statute Rev. Stat. 3701 cannot amend the specific tax statute Rev. Stat. 5219. Recognizing the exclusive treatment which Congress has given each statute, it wrote ". . . it is apparent that when Congress enacted §5219, it was focusing on the particular question of the taxation of bankshares, but when it amended §3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest from state and local taxation. Since there is no clear intention manifested by the amendment, to extend the exemption to bank shares to the extent of the banks holding of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by Section 5219." (App. 193).

Petitioners attack the decision below for relying upon the phrase "Except as otherwise provided by law" which appears in the unenacted code provision of 31 U.S.C. §742 (Pet. Brief 21). The absence of this phrase does not change the result of the statutory construction of the two statutes. It is interesting to note that in 1959 the House Committee on Ways and Means also understood this phrase to be included in the statute they were to amend.[21]

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[21]H.R. Rep. No. 1148, 86th Cong. 1st Sess. (1959) contains the following under the title. Technical Examination of the Bill:

> "Section 105. — This section amends section 3701 of the Revised Statutes of the United States. Section 3701 now provides that except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States are to be exempt from taxation by or under State or municipal or local authority.
>
> "Under the amendment, a new sentence is added to section 3701. The new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes and except estate taxes or inheritance taxes."

CONCLUSION

The taxation of bank shares is governed by Rev. Stat. 5219. In this Act, Congress has expressly consented to this local taxation of "all of the shares" without excluding federal obligations. This specific authorization by Congress cannot be abridged or modified by the general exemption statute.

It is respectfully submitted that the judgment of the Courts below should be affirmed.

Respectfully submitted,

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3

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No. 81-1717

In The

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BANK AND TRUST COMPANY, ET AL,

Petitioners,

vs.

DALLAS COUNTY, ET AL,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

BRIEF FOR RESPONDENTS, THE CITY OF GARLAND, AND TOM LANDRUM, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR OF THE CITY OF GARLAND, TEXAS

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Although Revised Statute 5219 has been amended several times[10] since the *Van Allen* decision, Congress has never restricted the consent as construed by that Court. On any one of those occasions, Congress could have revoked its consent to the state taxation of "all of the" shares, but did not.

In 1969, the last time this statute was amended, Congress did not limit its existing authorizations to state taxation but rather broadened the authority of states in taxing banks.[11] The comments of the Senate Banking and Currency Committee, S.Rep. No. 91-530, 91st Cong. 1st Sess. (1969), provide that the changes included in the amendment during the interim period from 1969-1973, "... [are] not a prohibition against the continued imposition of any tax under the authority of Section 5219 of the Revised Statutes as it now reads."

Final application of the revision was not to become effective until 1973 and during the intervening years, Congress requested the Board of Governors of the Federal Reserve System to study the impact of these revisions.[12]

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the exclusion of federal obligations owned by the banks. [citations omitted] This result was reached *in part* on the theory that the stockholders' interest in a corporation represent a separate property interest from the corporation's ownership of its assets, so that a tax on the stockholders' interest is not a tax on the federal obligations which are included in the corporate property." [Emphasis added]

[10]Act of February 10, 1868, ch. 7, 15 Stat. 34; Act of Mar. 4, 1923, ch. 267, 42 Stat. 1499; Act of Mar. 25, 1926, ch. 88, 44 Stat. 223; Act of Dec. 24, 1969, Pub. L. No. 91-156, §§1(a), 2(a), 83 Stat. 434; Act of Dec. 22, 1971, Pub. L. No. 92-213, §4(a), 85 Stat. 775.

[11]The senate debates indicate that the new legislation was intended to extend the power of states to tax national banks. *See* 115 Cong. Rec. 38634 (1969) (Remarks of Senator Tower) and 115 Cong. Rec. 35399 (1969) (Remarks of Senator Proxmire).

[12]Act of Dec. 24, 1969, Pub. L. No. 91-156 §4, 85 Stat. 435.

The four volume study is extensive, reporting the impact of the state taxation of national banks.[18] It contains a summary of applicable statutes which includes the general exemption statute Rev.Stat. 3701 (31 U.S.C. §742), as amended in 1959 and presents a detailed history of Rev. Stat. 5219, which discusses the case law involving the deduction of federal obligations from the share tax. Although this report exhausts all aspects of the 1969 revisions of Rev. Stat. 5219, there is no mention of the economic impact of the deduction of federal obligations from the share tax. The report acknowledges the existence of the share tax, with no deduction for federal obligations, yet offers no recommendations for change.

The Board of Governors' study was made over 10 years after the 1959 amendment of Rev. Stat. 3701 (31 U.S.C. §742) was enacted.

Throughout the legislative history of Rev. Stat. 5219, there is no manifestation of congressional intent to allow banks shareholders to escape state taxation by excluding federal obligations from the computation of their tax. On the contrary, Congress has expressly expanded the authority of the states and local governments, in the taxation of banks.

Because the taxation of banks is already specifically prescribed in Rev. Stat. 5219 (12 U.S.C. §548), it does not follow that Congress would attempt to amend this statute by another, Rev. Stat. 3701 (31 U.S.C. §742).

> The 1959 Amendment to Rev. Stat. 3701, Is a Codification of Prior Judicial Constructions of the Immunity of Federal Obligations.

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[18]SENATE COMMITTEE ON BANKING, HOUSING & URBAN AFFAIRS; STATE & LOCAL TAXATION OF BANKS, 92nd Cong., 1st Sess., U.S. Senate, Parts I-IV, Study Under Pub.L. No. 91-156, 92-213.

Even before 1959, this Court had construed Rev. Stat. 3701 to prohibit the inclusion of federal obligation in a tax which considered them in its computation. *See, e.g. Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143 (1955); *New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals*, 448 U.S. 665 (1950); *Home Ins. Co. of New York v. People of New York*, 134 U.S. 594 (1889). Justice Harlan in *Society for Savings in the City of Cleveland v. Bowers*, *supra* at 144, recognized that the exemption of federal obligations embodied in Rev. Stat. 3701, applied to a tax which considered United States obligations in the computation of the tax. He wrote, "The rule has been carried forward to embrace indirect taxation of such obligations through their inclusion in a tax imposed on all of the property of a taxpayer." As early as 1929, this Court looked beyond legislative language to ascertain the actual effect of the tax.[14] In doing so, the Court has refused, with the exception of the bankshare tax, franchise taxes and inheritance taxes, to uphold a state tax which attempts to reach exempt obligations indirectly in the measure of the tax.

In *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, *supra*, the Court found that a state tax levied against the intangible property of a corporation, which was computed from paid-up capital and surplus without deducting federal obligations on the interest thereon, was in violation of Rev. Stat. 3701. This decision, rendered nine years before the 1959 amendment, shows that the Court was concerned with the effect of the tax regardless of the language in

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[14]*The MacAllen Company v. Massachusetts*, 279 U.S. 620 (1929). Although the vitality of the holding in this case was questioned in *Tradesmen's National v. Oklahoma Tax Commission*, 309 U.S. 560, 568 (1940), this case provides a good example of the careful scrutiny which the Court uses in determining the actual nature of a tax.

which it was framed.[15] *See, Home Ins. Co. of New York v. People of the State of New York, supra.*

The General Statements included in the House Committee on Ways and Means[16] and the Senate Committee on Finance[17] Reports on the 1959 amendment of Rev. Stat. 3701, contain the following:

> "... Present law provides that obligations of the United States are to be exempt from taxation by or under state or local authority. *The Supreme Court has held that this includes the exemption of interest on United States obligations* from taxation by or under state or local authority..." [emphasis added].

Since Congress was aware that the Courts had required the exclusion of exempt obligations *considered* in the computation of a state tax, the 1959 amendment merely codified the existing rule. Even the Brief of American Bankers Association as amicus curiae, concedes that, "In all likelihood, Idaho's position would not have prevailed in court if it had been challenged." (Brief for American Bankers Association as Amicus Curiae 8).

There is nothing in the legislative history of this amendment to suggest that prior to 1959 Congress had interpreted the exemption, described in Rev. Stat. 3701, with the limited construction applied by Petitioners.

Petitioners argue that the specific exceptions of inheritance taxes and franchise taxes in Rev. Stat. 3701 somehow prove a Congressional intent to expand the law. (Pet. Brief

[15]Looking at the effect of the tax the Court said, "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds." *Supra* at 673.

[16]H.R. Rep. No. 1148, 86th Cong., 1st Sess. (1959).

[17]S. Rep. No. 909, 86th Cong., 1st Sess. (1959).

18). Just as the 1959 amendment embodied the judicial prohibition against taxes which considered federal bonds, it also embodied the franchise[18] and inheritance tax[19] exceptions which had been upheld by the Court prior to 1959.

It is clear from the opinions of this Court prior to 1959 that the immunity doctrine first enunciated in *McCulloch v. Maryland* and *Weston v. Charleston, supra,* extended to taxes which considered federal obligations in the computation of the tax. *See New Jersey Realty v. Div. of Tax Appeals, supra.* This concept is no different from that ultimately embodied in Rev. Stat. 3701 (31 U.S.C. §742) in 1959, yet it is a concept never applied to a true bank share tax, because that tax is controlled by a separate federal statute, Rev. Stat. 5219.

The 1959 Amendment to Rev. Stat. 3701 (31 U.S.C. §742) Does Not Control the Taxation of Bankshares.

Petitioners contend that the 1959 amendment to Rev. Stat. 3701 requires that federal obligations be deducted from a computation of the bank share tax. This argument assumes that Rev. Stat. 5219 has been amended or modified by Rev. Stat. 3701, the general exemption statute.

Revised statute 5219, specifically controls the taxation of national banks, while Rev. Stat. 3701 is a general exemption statute applicable to various types of federal obligations. *See, Smith v. Davis,* 323 U.S. 110 (1944). General rules of construction provide that in construing two statutes, the more specific statute takes precedence over the general one. *Radzanower v. Touche Ross & Co.,* 426 U.S. 148 (1976); *Morton v. Mancari,* 417 U.S. 535 (1974). In *Radzanower v.*

[18] *Werner Machine Co. v. Director of Taxation,* 350 U.S. 492 (1956).

[19] *Plummer v. Coler,* 178 U.S. 115 (1900).

Touche Ross & Co., supra, 155-156, Justice Stewart explained the principles of statutory construction in a situation of this nature: "It is the basic principal of statutory construction that the statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering and more generalized spectrum. '*Where there is no clear intention otherwise*, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.' *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974)." [emphasis added].

The underlying principle is to uphold the act, when Congress was focusing on the particular problems relating to a specific area, unless an intent to do otherwise is clearly expressed.

The primary concern in construing an act of Congress, is to "construe the language so as to give effect to the intent of Congress." *United States of America, v. American Trucking Association*, 310 U.S. 534, 542 (1940).

While Congress was debating the 1959 amendment to Rev. Stat. 3701, it was also considering, H.R. 8159 entitled "An Act to amend the national banking laws, to clarify or eliminate ambiguities, to repeal certain laws which have become obsolete, and for other purposes." Act of Sept. 8, 1959, Pub. L. 86-230, 73 Stat. 457. This Act amounted to a comprehensive revision of the banking laws of the United States.

Although, many banking provisions were altered by the revision, Rev. Stat. 5219 was not affected. Having recently completed a sweeping review of the banking laws, Congress had ample opportunity to amend Rev. Stat. 5219, at that time and to require the exclusion of federal obligations from the taxation of bankshares if it had chosen

so to do; yet, there is no mention of Rev. Stat. 5219 or its application in the legislative history of Rev. Stat. 3701.

Rev. Stat. 5219 obviously governs the taxation of national banks. The exhaustive discussion of the legislative history of the 1959 amendment made by both Petitioners and Respondents underscores the absence of clear congressional intent to amend Rev. Stat. 5219 by Rev. Stat. 3701. Repeals by implication are not favored. *Morton v. Mancari, supra.*

On other occasions, when Congress has in fact amended the banking laws, such changes were specifically expressed in the language of the statute.[20] In 1936, when Congress determined that preferred shares in national banks owned by the Reconstruction Finance Corporation were not to be subject to the local tax provisions of Rev. Stat. 5219, it passed the Act of Mar. 20, 1936, ch. 160, 49 Stat. 1185, which specifically removed national bank stock owned by the Reconstruction Finance Corporation from state & local taxation. *Maricopa County v. Vally Nat. Bank*, 318 U.S. 361 (1943). The Court in *Maricopa* upheld the new statute and explained that prior to the Act of March 20, 1936, those bank shares were subject to the provisions of Rev. Stat. 5219, because Congress had consented to the taxation of shares of stock of national banks. *Id.* at 359. Under the new statute, the consent, previously conferred by Congress was expressly withdrawn. This action of Congress had been prompted by an earlier decision of the Supreme Court, *Baltimore Nat. Bank v. State Tax Commission*, 297 U.S. 209 (1936) where it had held those shares to be subject to Rev. Stat. 5219.

[20]In 1964, Congress amended Rev. Stat. 5136, 12 U.S.C. §24. The amendment was contained in the Housing Act of 1964, Act of Sept. 2, 1964 Pub. L. No. 88-560, title vii, §701(c), 78 Stat. 800., which is not patently connected to the banking laws. However this revision refers to Rev. Stat. 5136 expressly in the text.

Congress has not manifested any intent to exclude federal obligations from the bankshare tax authorized under Rev. Stat. 5219, despite numerous judicial decisions holding the deduction is not required. The 1959 amendment cannot be interpreted to repeal or modify R.S. 5219 as judicially construed.

So long as the state taxation of bankshares is authorized by federal statute, both statutes must be construed together. Because of the complicated evolution of Rev. Stat. 5219, as it relates to those securities generally subject to the immunity of Rev. Stat. 3701, it is impossible to construe the relationship of these two statutes without studying their legislative histories and various judicial constructions. On looking at these two statutes, in light of all the relevant information, it becomes clear that in 1959 Congress, did not consciously intend to alter the bank share tax as it had been judicially construed since 1866.

Petitioners argue that the inclusion of these obligations in the computation of the share tax will make them less attractive investments and thereby place a burden on obligations of the federal government. (Pet. Brief 20). This same tax has been assessed since 1864 and of all the 50 bank petitioners only one bank did not own federal obligations (Pl. Ex. 32).

At trial, Petitioners could not even show that the obligations in question had been purchased from funds derived from the capital of the bank. Therefore they have not demonstrated that these obligations are in fact burdened by the share tax. (App. 69-79).

It is over 20 years since the amendment to Rev. Stat. 3701 was enacted, yet only at this late date have the bank shareholders and the Treasury Department allegedly discovered the intent of Congress.

Congress should determine whether its bonds are suffering by virtue of this tax. "The imposition of increased financial burden on the Government does not, by itself, vitiate a state tax." *United States v. Detroit*, 355 U.S. 466 (1958); *see also James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941).

It is a question of whether Congress intended to sequester millions of dollars from state and local government taxation. A deduction of these obligations from the bank share tax, will remove approximately eight million dollars of tax revenues from the City of Dallas and Dallas Independent School District per year. Throughout the legislative history and case law reviewed in relation to this tax, there is nothing to support a finding that such a result was intended by Congress.

The Decision Below

The opinion of the Court of Civil Appeals 5th Supreme Judicial District of Texas at Dallas correctly interpreted the opinion in *Van Allen*. (App. 183 *et seq)*. The Texas Court recognized that the bank share tax was based on the ground, "...that the Congress in authorizing the organization of national banks, could attach conditions to the exercise of the privileges conferred, including the subjection of such shares to state taxation." (App. 186). The Texas Court also found, "In discussing this ground, the [Van Allen] court again relied on the National Bank Act, including the provision consenting to state taxation of national bank shares saying that although Congress, by reason of its paramount authority, could exclude the states from such taxation, it could also withhold the exercise of that authority and leave the states free to act." (App. 186).

The Texas Court of Civil Appeals applied the rules of judicial construction, announced by this Court in determining

that the general exemption statute Rev. Stat. 3701 cannot amend the specific tax statute Rev. Stat. 5219. Recognizing the exclusive treatment which Congress has given each statute, it wrote ". . . it is apparent that when Congress enacted §5219, it was focusing on the particular question of the taxation of bankshares, but when it amended §3701 in 1959, its focus was on the general exemptions of federal securities, including both principal and interest from state and local taxation. Since there is no clear intention manifested by the amendment, to extend the exemption to bank shares to the extent of the banks holding of federal securities, the apparent intention was to leave unimpaired the consent to such taxation provided by Section 5219." (App. 193).

Petitioners attack the decision below for relying upon the phrase "Except as otherwise provided by law" which appears in the unenacted code provision of 31 U.S.C. §742 (Pet. Brief 21). The absence of this phrase does not change the result of the statutory construction of the two statutes. It is interesting to note that in 1959 the House Committee on Ways and Means also understood this phrase to be included in the statute they were to amend.[21]

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[21]H.R. Rep. No. 1148, 86th Cong. 1st Sess. (1959) contains the following under the title. Technical Examination of the Bill:

> "Section 105. — This section amends section 3701 of the Revised Statutes of the United States. Section 3701 now provides that except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States are to be exempt from taxation by or under State or municipal or local authority.
>
> "Under the amendment, a new sentence is added to section 3701. The new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes and except estate taxes or inheritance taxes."

CONCLUSION

The taxation of bank shares is governed by Rev. Stat. 5219. In this Act, Congress has expressly consented to this local taxation of "all of the shares" without excluding federal obligations. This specific authorization by Congress cannot be abridged or modified by the general exemption statute.

It is respectfully submitted that the judgment of the Courts below should be affirmed.

Respectfully submitted,

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Respondent's Brief

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Appendix p. 44a. of Petition. This first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at Appendix p. 4a. The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at Appendix p. 28a.

The summary opinion of the court below in Cause No. 20915, replying exclusively on the opinion in Cause No. 20660, was not reported and is reproduced at Appendix p. 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

STATUTORY PROVISIONS

Section 3701 of the Revised Statutes of the United States[1]

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

31 U.S.C. §742 as amended in 1959

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

12 U.S.C. §548 before its amendment in 1969

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States

[1]Originally enacted by Act of February 25, 1862, Ch. 33, §2, 12. Stat. 346 and later amended by Pub. L.No. 86-346, §105(a), 73 Stat. 622 (1959) and embodied in 31 U.S.C. §742.

may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

   (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

   (c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own law or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from

national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located within the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. §5219; March 4, 1923, c. 267, 42 Stat. 1499; March 25, 1926, c. 88, 44 Stat. 223.

12 U.S.C. §548 after its amendment in 1969

For the purpose of any tax law enacted under authority of the United States or any States and any

State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960)

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in care of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be in a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

The City of Garland, et al, adopts the Brief of Respondents, the City of Garland, the Board of Equalization of the City of Garland, and the Garland Independent School District and Dallas County, as if fully set out herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Respondents has been mailed to Marvin S. Sloman, 2500 South Tower, Plaza of the Americas, Dallas, Texas 75201, and to all other counsel of record on this the 14th day of January, 1983.

Charles M. Hinton, Jr.

Respondent's Brief

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Supreme Court of the United States

October Term, 1982

American Bank and Trust Company, et al.,
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vs.

Dallas County, et al.,
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BRIEF FOR RESPONDENTS RICHARDSON INDEPENDENT SCHOOL DISTRICT; N. G. JOHNSON, INDIVIDUALLY AND AS TAX ASSESSOR-COLLECTOR FOR THE RICHARDSON INDEPENDENT SCHOOL DISTRICT; AND, THE BOARD OF EQUALIZATION FOR THE RICHARDSON INDEPENDENT SCHOOL DISTRICT AND ITS MEMBERS R. H. THOMPSON, NELSON McCORD, AND MORRIS JAMES

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QUESTION PRESENTED

Whether a state property tax on bank shares computed on the actual cash value of the shares less a proportionate amount per share at which the bank's real estate is assessed, without any deduction for tax-exempt United States obligations owned by the bank, violates 31 U.S.C. § 742?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The original opinion of the court below in Cause No. 20660, withdrawn by the court below on rehearing and not published, is reproduced at Joint Appendix (App.) 164. The first opinion of the court below on rehearing is reported at 615 S.W.2d 810 and is reproduced at App. 174.

The second opinion on rehearing is reported at 615 S.W.2d 823 and is reproduced at App. 198.

The summary opinion of the court below in Cause No. 20915, relying exclusively on the opinion in Cause No. 20660, was not reported and is reproduced at App. 127. These Respondents were parties in Cause No. 20915.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' Brief.

STATUTORY PROVISIONS

Rev. Stat. 3701 (31 U.S.C. § 742)

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Rev. Stat. 3701 (31 U.S.C. § 742) as amended in 1959

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Rev. Stat. 5219 (12 U.S.C. § 548)
before its amendment in 1969

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in the case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon

mercantile, manufacturing, and business corporations doing business within its limits: *Provided,* however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own law or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located within the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capitals.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratify-

ing, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said Section. R.S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.

Rev. Stat. 5219 (12 U.S.C. § 548) after its amendment in 1969

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960)

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officers of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be in a lien

thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

STATEMENT OF THE CASE

Banking corporations in the State of Texas and their shareholders are taxed according to Tex.Rev.Civ.Stat.Ann. Art. 7166 (Vernon 1960). The bank itself is taxed only upon its real property, while its shareholder's are taxed upon the value of their shares. Real property to the bank is deducted proportionately from the value of the shareholder's shares. (App. 32).

The share tax in Cause No. 20915 was assessed upon the equity capital as designated on each bank's statement of condition for December 31, 1979. (App. 31).

Petitioners sued for injunctive and declaratory relief on the grounds that this method of taxation violates federal law by including federal obligations in the computation of the tax. (App. 8). The Courts below found that there was no violation of federal law and Petitioners now seek a writ of certiorari from this Court to review those judgments. (App. 127-130, 174-204).

ADOPTION OF ARGUMENT

Respondents Richardson Independent School District; N. G. Johnson, Individually and as Tax Assessor-Collector for the Richardson Independent School District; and, The Board of Equalization for the Richardson Independent

School District and Its Members R. H. Thompson, Nelson McCord, and Morris James (hereinafter collectively referred to as "Richardson Independent School District Respondents"), hereby adopt and incorporate as if fully set forth herein the Argument contained in the Brief of Respondents City of Dallas; Max Noller, the Board of Equalization of the City of Dallas, and Dallas Independent School District.

It is the position of the Richardson Independent School District Respondents that such adoption and incorporation is both legally and practically desirable insofar as it will avoid the duplication of legal argument which would otherwise necessarily result due to the identity of legal issues and position shared by the Richardson Independent School District Respondents and City of Dallas Respondents.[1]

CONCLUSION

The taxation of bank shares is governed by Rev.Stat. 5219. In this Act, Congress has expressly consented to this local taxation of "all of the shares" without excluding federal obligations. This specific authorization by Congress cannot be abridged or modified by the general exemption statute.

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[1]All Petitioner Banks within the taxing jurisdiction of Richardson Independent School District Respondents (Equitable Bank, Texas Commerce Bank-Park Central, Valley View Bank, and White Rock Bank) are also within the taxing jurisdiction of the City of Dallas Respondents.

It is respectfully submitted that the judgment of the Courts below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

At or before the time of filing, three copies of the Brief of the Richardson Independent School District Respondents shall be or have been served on each party to the proceeding by mail by depositing three copies of said Brief in a United States post office or mail box, with first class postage prepaid, addressed to each party's counsel of record at his post office address.

HENRY D. AKIN, JR.

Amicus Brief

1

MOTION FILED
DEC 15 1982

No. 81-1717

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District Of Texas In Dallas

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITIONERS

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December 15, 1982

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---

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petitioners. The motion is necessary because consent to the filing of a brief has been refused by one or more of the respondents.

INTEREST OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association ("ABA") is the largest national trade association of the commercial banking industry in the United States. Its membership includes approximately 13,200 commercial banks, or about 90% of the industry. ABA member banks are located in each of the fifty states and the District of Columbia, and include banks chartered by the United States and those chartered by their respective states.

Of the $740.9 billion in public debt of the United States Treasury held by private investors, $117 billion is in the hands of commercial banks;[1] and of the $634.6 billion of debt of other federal agencies held by private parties, $74.7 billion is held by commercial banks.[2]

In a very real sense, the laws of Texas and at least six other states[3] impose a tax upon these holdings, despite the provisions of a federal law which specifically exempts such holdings from state and local taxation in any way, shape or form. The court below upheld the Texas state law, thus subjecting ABA member banks to unlawful taxation. The American Bankers Association, with the leave of the Court, desires to represent the interests of its member banks nationwide in respect of this issue.

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[1] Federal Reserve Bulletin, October, 1982, at A-32 (figures for June, 1982).

[2] *Id.*, at A-33 (figures for July, 1982).

[3] *See: Ga Code Ann.* § 91A-3301; *La. Rev. Stat. Ann.* §§ 47:8, 47:1967; *Nev. Rev. Stat.* ch. 367.020-070; *Ohio Rev. Code Ann.* §§ 5709.04, 5711.01(B)(3); *Pa. Stat. Ann.* tit. 72, §§ 7701 *et seq.*; *W. Va. Code* ch. 11-3-14, 11-3-14a.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae* in support of the petitioners.

Respectfully submitted,

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December 15, 1982

QUESTION PRESENTED

Whether a state property tax on bank shares computed on a bank's net assets without any deduction for tax-exempt United States obligations owned by the bank violates 31 U.S.C. § 742?

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Respondents.

On Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District Of Texas In Dallas

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Commercial banks in Texas and elsewhere hold over $190 billion in securities and debt instruments of the United States or its agencies, which sum makes up a substantial percentage of the assets of the commercial banking industry. Where the assets of a bank are in some fashion used to form the base upon which state or local taxes are calculated, it is obvious that the inclusion or exclusion of a major element of assets in the base will make a great difference in the actual amount of taxes due.

Federal securities cannot be subjected to state and local taxation unless Congress consents to it. In this case

Congress has not done so. Consequently, the Texas law in issue here imposes a substantial, unjust and unlawful tax upon banks which hold such federal securities.

The Texas banks which are parties to this action are well represented and qualified to defend their own interests, but as indicated in the foregoing motion, the case has impact beyond that state. At least six other states have comparable tax laws which affect ABA member banks located within their borders. As the largest national trade association of the commercial banking industry and a frequent litigant or *amicus curiae* in cases of nationwide importance to commercial banking, the American Bankers Association respectfully submits that it is uniquely qualified to represent the interests of the industry at large.

SUMMARY OF THE ARGUMENT

Realistically, the interpretation of a single federal statute is the only issue in this case. That statute exempts federal securities from state and local taxation, and indeed forbids the states and localities even to consider federal securities in the calculation of taxes. Since Texas does "consider" the value of federal securities held by commercial banks as a part of the total value of the bank shares upon which taxes are assessed, the plain meaning of the federal statute bars the imposition of such taxes. The legislative history of the federal statute is not inconsistent with its plain meaning. If the petitioners in this case were persons or organizations other than banks, the outcome of the controversy would be clear: In order for the tax to be lawful, a deduction from the base would have to be allowed for government securities. The result should not be different because the petitioners are banks. Arguments for a contrary result based upon the status of

the petitioners as banks merely obfuscate the issue, since such arguments are based upon a statute (and a judicial interpretation of it) which has long since been repealed and is no longer relevant.

ARGUMENT

I.

BACKGROUND OF THE CASE

In 1979, the Texas law relative to bank share taxes provided as follows:

> Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in the case of his failure to do so, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a grea-

> ter rate than is assessed against other moneyed capital in the hands of individuals.[1]

Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960).

This law does not allow a deduction from the "actual cash value" of bank shares for a proportionate amount per share of the value of U.S. government securities held by the bank.

On September 5, 1979, the Bank of Texas, one of the petitioners, filed suit in Dallas County District Court on its own behalf and on behalf of its shareholders against Dallas County, the Dallas County Board of Equalization and the Tax Assessor-Collector of Dallas County, Texas. Among other things, the bank claimed that this failure to allow a deduction for the proportionate value of federal securities violated the exemption from state and local taxation of obligations of the federal government provided by 31 U.S.C. § 742.[2]

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[1] As of January 1, 1982, this section has been superceded by Texas Property Tax Code §§ 21.09, 22.06, 23.11, and 25.14 (Vernon Supp. 1981) without substantive change for the purposes of this case.

[2] Section 742 provides as follows:

> (Except as otherwise provided by law), all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The parenthetical is not part of the statute as enacted, *Rev. Stat.* § 3701. Rather, it was put there in 1926 by codifiers of the U.S. Code. *See* 31 U.S.C.A. § 742 (West Supp. n. 1981).

The trial court entered judgment for the defendants and the bank appealed. On November 7, 1980, the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas reversed, holding in relevant part that

> the plain language of section 742 (of Title 31, U.S. Code) as amended exempts United States obligations from being considered in the computation of any state or municipal or local tax. The tax here in question is illegal because United States obligations were included in determining the actual cash value of the property to be taxed.

Bank of Texas v. *Childs*, reprinted in the Petition for Writ of Certiorari, p. 50a.

The local taxing authorities petitioned the court for a rehearing, which was granted. On rehearing the court withdrew the original opinion and affirmed the trial court's decision. *Bank of Texas* v. *Childs*, 615 S.W.2d 810 (Tex. Civ. App. 1981). The court then summarily disposed of several similar cases involving other banks which are petitioners here, on the authority of the decision reached in *Bank of Texas*. The banks' subsequent Application for Writ of Error to the Supreme Court of Texas was refused on January 6, 1982. The banks then petitioned this Court for a Writ of Certiorari, which was granted on November 1, 1982, limited to the issue set forth at page iv above.

For the reasons stated herein, the American Bankers Association submits that the initial decision of the Court of Civil Appeals was correct and the court should not have withdrawn its original opinion. Its action in doing so should be reversed by this Court.

II.

THE PLAIN MEANING OF THE STATUTE

The governing statute in this case, 31 U.S.C. § 742, is clear, unambiguous and conclusive of the issue presented. It exempts from state and local taxation all obligations of the United States. Moreover, it forbids the states and localities even to *consider* United States obligations or the interest thereon directly or indirectly in calculating state or local taxes. The few exceptions to this broad-based exemption are not relevant here. The exemption does not apply to "franchise or other nonproperty taxes," but a bank share tax does not fit within that category. *City & County of Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79, 81 (1940); *Spokane & Eastern Trust Co.* v. *Spokane County*, 70 Wash. 48, 126 P. 54 (1912). The exemption also does not apply to estate or inheritance taxes, which also obviously are not at issue in this proceeding.

Where a law is plain and unambiguous, as this one is, the language of the statute must ordinarily be regarded as conclusive, except in the case of a "*clearly* expressed legislative intention to the contrary." *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980) (emphasis supplied). Nevertheless, Texas *does* consider and takes into account U.S. obligations among the assets of commercial banks in computing taxes due by the shareholders of the banks. Indeed, the respondents have admitted as much, though, of course, they claim that imposition of a bank share tax is lawful under the *Van Allen*[3] line of cases regardless of the statute. *See* Brief in

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[3] *Van Allen* v. *Assessors*, 3 Wall. (70 U.S.) 573 (1866). *See* text below at 12-13.

Opposition for Respondents The City of Dallas, *et al.* at 7-8.

> The Court of Civil Appeals so held in substance:
>
> Article 7166 provides that the real estate owned by the bank shall be separately rendered and assessed, and that all shares shall be rendered at their actual cash value, but that each share shall be assessed only for the difference between the actual cash value and the proportionate amount per share at which its real estate is assessed. No provision is made for a similar deduction with respect to the federal securities held by the bank.
>
> The evidence shows that the assessed value of the shares for 1979 was determined by book value rather than market value, that is, by subtracting the bank's liabilities from its total assets, deducting the assessed value of its real estate, and dividing that net figure by the number of shares to determine the taxable value per share. There is also evidence showing that if all obligations of the United States held by the bank were deducted from the value of the net assets, nothing would remain to be divided proportionately among the shareholders.

Bank of Texas v. *Childs*, *supra*, 615 S.W.2d at 816.

Thus, in the absence of some powerful legislative history indicating that Congress did not mean what it said, or in the absence of some implied repeal of section 742 by subsequent legislation, section 742 conclusively denies to the State of Texas the right to do what it has attempted to do in this case. *Montana Bankers Association* v. *Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909, 912 (1978).

III.

LEGISLATIVE HISTORY OF SECTION 742

The first sentence of present section 742, which simply exempts securities of the United States from state or local taxation, has been a part of the statutes of the United States, in substantially its present form, since 1862. Act of Feb. 25, 1862, c. 33, § 2, 12 Stat. 346. Consistently thereafter, this Court has required the exclusion of federal securities or obligations from the tax base wherever a state has attempted to impose a tax upon the property or capital of a corporation itself. *See: The Banks* v. *The Mayor*, 7 Wall. (74 U.S.) 16 (1869); *Home Savings Bank* v. *City of Des Moines*, 205 U.S. 503 (1907); *Farmers & Merchants Savings Bank* v. *Minnesota*, 232 U.S. 516 (1914); *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Society for Savings* v. *Bowers*, 349 U.S. 143 (1955). Despite this long and consistent interpretation of old section 742, the State of Idaho attempted to include interest earned on federal obligations in its taxpayers' "gross income" for purposes of its individual income tax. The State argued that the tax was not a tax upon federal obligations (which were admittedly exempt from taxation under old section 742), but rather upon every individual measured by his net income. In all likelihood, Idaho's position would not have prevailed in court if it had been challenged. Rather than engage in prolonged litigation, however, the Eisenhower Administration, in 1959, sought a clarifying amendment to section 742. (*See* Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings before the House Committee on Ways and Means, 86th Cong., 1st Sess. 69-72 (1959) (statement of Secretary of the Treasury Robert B. Anderson)).

The purpose of the proposed clarifying amendment was clearly set forth by the Secretary:

> If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financial operations in general.

Id. at 72.

Congress agreed. It enacted the second sentence of present section 742 as proposed, with the House Ways and Means Committee Report stating that

> the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc. taxes . . . [T]he new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes [sic] and except estate taxes or inheritance taxes.

H.R. Rep. No. 1148, 86th Cong., 1st Sess. 2, 8, 12 (1959). *See also* S. Rep. No. 909, 86th Cong., 1st Sess. (1959).

Certainly, it is true, therefore, that the actions of a single state provided the impetus to Congress, in 1959, to enact an amendment to section 742. But it is equally clear that Congress did not seek to limit the amendment only to the peculiar facts and circumstances arising from the Idaho tax law. To the contrary, Congress painted with a broad brush, specifically covering *every* form of taxation (with the stated exceptions discussed above), which even *considers* U.S. obligations, *directly or indirectly*. This

approach hardly leaves room for any implied exceptions to the wide scope of the language used. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). Nothing in the legislative history of the 1959 amendment could be construed as the "clearly expressed legislative intention" that the common, ordinary English language meaning of the law not be applied. Judicial decisions subsequent to the 1959 amendment have applied the plain meaning of the statute in striking down state laws which, even indirectly, seek to impose a tax upon banks, corporations or individuals measured in part by their holdings of or income from U.S. government obligations. *Montana Bankers Association* v. *Montana Department of Revenue*, *supra*, 580 P.2d; *Federal Products Corp.* v. *Norberg*, 429 A.2d 447 (R.I. 1981).[4] Indeed, as noted above, even the Texas Court of Civil Appeals was initially prepared to adopt the plain meaning of the statute and disallow the bank share tax in question here.

IV.

THE STATUS OF THE PETITIONERS AS BANKS AND BANK SHAREHOLDERS

What has preceded this section of the brief is a discussion of the language and legislative history of a statute which pertains to the state and local tax exemption of U.S. obligations in general. It leaves open only the question whether a different result might be justified merely because the petitioners are banks and bank shareholders. In this section we show that banks were indeed treated

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[4] *Contra: Bartow County Bank* v. *Bartow County Board of Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), appeal docketed, No. 81-1834 (April 5, 1982).

differently under prior law, but that law has been changed, so as to bring treatment of banks into conformity with the treatment accorded other holders of U.S. government obligations. The court below erred in confusing a Congressional consent to state taxation of federal instruments as opposed to a consent to state taxation of federal instrumentalities.

We begin with the proposition that *national* banks are federal instrumentalities, and, as such, would be entirely exempt from state and local taxation in the absence of Congressional consent. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Owensboro National Bank* v. *City of Owensboro*, 173 U.S. 664 (1899). Originally Congress did not consent to state taxation of national banks. Act of Feb. 25, 1863, c. 58, 12 Stat. 665. State-chartered banks, not having the status of federal instrumentalities, were not so favored, making shares of a national bank a more attractive investment than shares of a state bank. Such a disparity of treatment was thought to threaten the continued existence of state banks, and was soon remedied.[5] Section 41 of the National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 111, authorized state taxation of a national bank's real estate as any other real estate, and also provided that the Act should not be construed to prevent

> *all the shares* in any of the said associations held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority.

(Emphasis supplied).

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[5] Anderson, *Federal and State Control of Banking*, 201-02 (1934).

In 1878, with minor changes, this provision of the National Bank Act became section 5219 of the Revised Statutes, and later appeared as 12 U.S.C. § 548. The law did not permit the states to impose upon the shares of a national bank a tax greater than that imposed upon state-chartered banks.

On the one hand, therefore, *all* stocks, bonds and other securities of the United States were exempt from taxation under a law enacted in 1862; on the other hand, *all* of the shares of national banks could be subjected to taxation by the states under a law enacted two years later, so long as state banks were likewise subjected to comparable state taxation. Given the fact that some or all of the assets of commercial banks making up the aggregate of the "shares" of those banks consisted of U.S. government obligations, the two statutes existing side by side seemed inconsistent.

The Supreme Court reconciled the apparent conflict in the 1866 case of *Van Allen* v. *Assessors*, *supra*, 70 U.S. It held that the State of New York had the "power to authorize the taxation of the shares of national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States." *Id.* at 582. The Court pointed out that the tax was not one upon the obligations of the United States, since those obligations were held by the bank and the bank was not subject to the tax. The tax was instead upon the shareholders of the bank who did not own U.S. government obligations. Consequently, a law which permitted the states to tax "all the shares" of a national bank would authorize New York to collect the challenged tax, even though those shares depended for their value upon obligations of the United States.

After *Van Allen* the Court adhered to its reasoning on many occasions over the next ninety years. *People ex rel. Duer* v. *Commissioners of Taxes & Assessment of City and County of New York*, 4 Wall. (71 U.S.) 244 (1867); *First National Bank of Louisville* v. *Kentucky*, 9 Wall. (76 U.S.) 353 (1870); *Cleveland Trust Co.* v. *Lander*, 184 U.S. 111 (1902); *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103 (1923); *Society for Savings* v. *Bowers*, *supra*, 349 U.S. The *Lander* case is of particular interest, in that it extended the *Van Allen* reasoning to state taxation of shares of state-chartered banks, where the value of those shares depended in part upon U.S. obligations. This shows that the intent of Congress in enacting the bank share tax statute in 1864 was to provide an exception to the general rule against state taxation of federal obligations, *not* an exception to the rule against state taxation of federal instrumentalities. Congress may or may not choose to allow state taxation of *national* banks as it sees fit, but it hardly has any business "consenting" to state taxation of *state* banks.

Here is where the court below made its fundamental error. It held that

> [a]lthough we originally reached the same conclusion as the Montana court,[6] further examination of section 3701 in the light of the decisions of the Supreme Court has persuaded us that the Montana decision is unsound because it ignores the opening words of the statute, "Except as otherwise provided by law,"[7] and

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[6] Reference is to *Montana Bankers Association* v. *Montana Department of Revenue*, *supra* 580 P.2d.

[7] We have already pointed out the court's error in this respect. The opening clause of 31 U.S.C. § 742 was never enacted into law by Congress.

> also ignores another statute, section 5219 of the Revised Statutes of the United States, which falls within this exception. As we shall show in the discussion following, *section 5219*, upon which the *Van Allen* rule is based, *expressly consents to local taxation of national banks*, and, by implication, also consents to taxation of shares in state banks. It has been construed in *Van Allen* and the cases following it to extend this consent to the full interest of the shareholder in shares in both national and state banks, even though the tax is measured by the bank's capital without any deduction of federal securities held by the bank. When we read the exemption statute, section 3701 as amended in 1959, together with the consent statute, section 5219, it appears to us that Congress did not intend by the amendment to withdraw in any respect its consent to state taxation of national or state bank shares.

Bank of Texas v. *Childs*, *supra* 615 S.W.2d at 817 (footnote omitted; emphasis supplied).

It is not correct that section 5219, as it existed at the time of the *Van Allen* case, consented to taxation of national banks. Clearly, it consented only to taxation of national bank *shares*, owned by persons or corporations who presumably were not themselves federal instrumentalities like the national banks were.[8]

In 1969, section 5219 was changed entirely. All references to Congressional consent to the state taxation of

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[8] From 1864, the statute has consented to taxation of the real estate of national banks by the states (Act of June 3, 1864, c. 106, § 41, 13 Stat. 112), and after 1923, the statute consented to state taxation of the net income of national banks (Act of March 4, 1923, c. 267, 42 Stat. 1499), but neither form of tax is in issue in this proceeding.

"all of the shares" of national banks were deleted and replaced with the following:

> [12 U.S.C.] § 548 State taxation
>
> For the purpose of any tax law enacted under the authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

(As amended, Dec. 24, 1969, Pub. L. No. 91-156, § 2(a), 83 Stat. 434).

As written, the newest version of the law now clearly consents to the state taxation of federal instrumentalities, national banks, unlike the prior versions which consented to state taxation of federal obligations. Whatever consent to taxation of federal *obligations* may have been found in the law prior to the 1969 amendment it no longer appears in the statute. Yet Texas, in this case, still attempts to tax those federal obligations in the form of a share tax—a tax upon the shareholders of a bank rather than upon the bank itself. To the extent that the shareholders' interests depend upon the value of U.S. obligations, for which no deduction is allowed, one looks in vain for some excuse or justification for the State's action in the present law.

CONCLUSION

31 U.S.C. § 742, as amended in 1959, after the last of the *Van Allen* line of cases, on its face clearly prohibits state taxation of federal obligations, not only directly as was the case with earlier versions of the law, but also indirectly, even to the extent of prohibiting the consideration of U.S. obligations or the earnings on those obligations in establishing a tax base.

In an effort to overcome the plain meaning of the statute, the Texas courts have seized upon the words "except as otherwise provided by law" which do not even appear in the law as enacted; have followed interpretations of this Court which do not deal with the law as it exists today; and finally have relied upon a statute which was repealed 13 years ago to arrive at their conclusion—all without benefit of supportive legislative history.

Their judgment was in error and should be reversed.

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Amicus Brief

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In the Supreme Court of the United States

October Term, 1981

AMERICAN BANK AND TRUST COMPANY et al.,

Petitioners

v.

DALLAS COUNTY et al.,

Respondents

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

Motion for Leave To File an Amicus Curiae Brief in Support of Petitioners

BRIEF OF DALE NATIONAL BANK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondents

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Dale National Bank hereby respectfully requests permission to file the attached Amicus Curiae Brief in support of Petitioners in the above-captioned matter for the reasons stated therein.

Respectfully submitted,

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DALLAS COUNTY, et al.,
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---

BRIEF OF DALE NATIONAL BANK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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I.

STATEMENT OF INTEREST

Dale National Bank (hereinafter referred to as Dale) is a national bank organized and existing under the laws of the United States of America with its principal office located in Johnstown, Pennsylvania.

The Commonwealth of Pennsylvania imposes the Pennsylvania Bank Shares Tax, Pa. Cons. Stat. 72 §7701 (Purdon Supp. 1982), against the shares of stock of Dale and other national banks, as well as state banks, located in Pennsylvania. The tax, which is substantially similar to the tax imposed against the shares of the Petitioners by the State of Texas, Tex. Rev. Civ. Stat. Ann. Art. 7166 (Vernon 1960), is paid directly by Dale out of its funds.

Dale and other banks currently have numerous appeals pending before the Pennsylvania Commonwealth Court and various administrative appeal boards which raise, *inter alia*, the same issue concerning the effect of the 1959 amendment, Pub. L. No. 86-346, Title I, §105(a), 73 Stat. 622 (1959), to Section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976), as is presented by the Petitioners.

II.

SUMMARY OF ARGUMENT

In 1959, Pub. L. No. 86-346, §105(a), 73 Stat. 622 (1959) expanded the scope of the exemption from state taxation of United States obligations previously set forth in Section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976).

The effect of the clear, unambiguous language of P.L. 86-346 is to exempt the value of United States obligations held by banks from state taxation of the shares of stock of banks, as measured by the value of the assets of the banks.

That Section 3701, as amended by P.L. 86-346, exempts United States obligations held by banks from state bank shares taxation is supported by the express intent of Congress in enacting P.L. 86-346.

The improper interpretation of Section 3701, as amended by P.L. 86-346, by the Texas Courts results in increased borrowing costs to the Federal government and renders Section 3701 violative of Article I, §8, Clause 2 of the Constitution of the United States.

III.

ARGUMENT IN SUPPORT OF PETITIONERS

Point I

The Texas Courts Have Rendered Decisions Contrary to the Clear Language of a Federal Law

Prior to 1959, Section 3701 of the Revised Statutes of the United States, 31 U.S.C. §742 (1976), read as follows:

> All stocks, bonds, Treasury notes, and all other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority.

Section 3701 was amended in 1959 by the addition of the following sentence:

> This exemption extends to every form of taxation that would require that either the obligation or the interest thereon, or both, be considered, either directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Pub. L. No. 86-346, §105 (a), 73 Stat. 622 (1959).

The effect of the plain, unambiguous language of P.L. 86-346 is to expand the scope of the exemption previously set forth in Section 3701. The amendatory language of P.L. 86-346 clearly exempts the value of United States ob-

ligations held by banks from state taxation of the shares of stock of banks, as measured by the value of the assets of the banks. This has been recognized by the Supreme Court of Montana which has held that Section 3701, as amended by P.L. 86-346, exempts United States obligations in the computation of the Montana Bank Shares Tax. *Montana Banker's Association v. Montana Department of Revenue,* 177 Mont. 112, 580 P.2d 909 (1978).

There is no question that a bank shares tax considers, directly or indirectly, United States obligations held by banks in the computation of the tax. This Court has consistently held that although a state tax on the shares of a bank is a tax on the shares in the hands of the shareholders of the bank, such a tax is clearly measured by and considers the assets of the bank, including United States obligations and interest thereon owned by the bank in the computation of the tax. *Society for Savings v. Bowers,* 349 U.S. 143 (1955); *Des Moines National Bank v. Fairweather,* 263 U.S. 103 (1923).

Thus, the decisions of this Court concerning the nature of a bank shares tax mandate that the value of United States obligations and interest thereon be exempted from the computation of such taxes pursuant to Section 3701 of the Revised Statutes of the United States, as amended by P.L. 86-346. The failure to remove the value of the United States obligations held by Petitioners results in those obligations being indirectly considered in the computation of the Texas bank shares tax in violation of the plain and unambiguous language of P.L. 86-346.

The Texas courts failed to comprehend that the issue involved in the cases before the Court is controlled by a federal statute which is plain and unambiguous on its face.

Rather, in an obvious attempt to circumvent Section 3701 of the Revised Statutes, as amended by P.L. 86-346, the Texas courts have rendered erroneous opinions in which the reasoning is strained, and contrary to settled principles of statutory construction. In essence, the opinions of the Texas courts have rendered meaningless the Amendment to Section 3701 which Congress intended to effect through P.L. 86-346.

Furthermore, the opinion of the Texas courts rests, in large part, upon a provision of Section 3701 which was never enacted into law. The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas states:

> Although we originally reached the same conclusion as the Montana court, further examination of Section 3701 in light of decisions of the Supreme Court has persuaded us that the Montana decision *is unsound because it ignores the opening words of the statute,* 'Except as otherwise provided by law,' and also ignores another statute, Section 5219 of the Revised Statutes of the United States, which falls within this exception.

Bank of Texas v. Childs, 615 S.W.2d 810, Rehearing denied, 615 S.W.2d 810 (Tex. Civ. App. 1981), at 817 (emphasis added).

The Texas courts apparently did not realize that the introductory clause, "Except as otherwise provided by law," is not part of Section 3701 of the Revised Statutes of the United States, but was inserted by the codifiers of the 1926 United States Code. Since this Section of the United States Code has not been enacted into positive law, the

introductory clause is not part of the statute. *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950).

The Montana Supreme Court properly stated: "The language of the 1959 amendment is clear, unambiguous, direct, and certain. The plain language provides an exemption to *every form of state taxation that requires United States obligations or interest to be considered directly or indirectly in the computation of the tax.* The statute speaks for itself." *Id.* at 117, 580 P.2d at 912 (emphasis in original). Accord, *First Security Bank v. Montana Department of Revenue,* 177 Mont. 119, 580 P.2d 913 (1978).

Point II

The Decisions of the Texas Courts Are Not Only Contrary to the Clear, Unambiguous Language of a Federal Law, but Are Contrary to the Expressed Congressional Intent in Enacting Such Law

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It is a fundamental principle in the construction of a federal statute that the language of the statute controls when it is sufficiently clear on its face. *Ernst & Ernst v. Hockfelder,* 425 U.S. 185 (1976). The language of Section 3701, as amended by P.L. 86-346, is utterly without ambiguity and a review of the legislative history of P.L. 86-346 is not necessary to resolve the issue before the Court.

However, should such a review be made, the legislative history of P.L. 86-346 fully supports the proposition that it was intended to extensively expand the exemption provisions of Section 3701 so as to exempt the value of

United States obligations and interest thereon from the computation of numerous types of taxes, including state bank shares taxes.

Public Law 86-346 was enacted as a part of a comprehensive attempt by Congress, at the request of the President, to secure greater marketability for United States obligations and to ensure that the marketability of such obligations would not be hindered by state taxation which considered, either directly or indirectly, United States obligations or interest derived therefrom in the computation of such taxes. S. Rep. No. 909, 86th Cong., 1st Sess. (1959). Senate Report 909 states:

> Under the amendment, a new sentence is added to section 3701 [§742]. The new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of that tax. . . .

1959 U.S. Code Cong. & Ad. News 2769, 2777.

The intent of Congress to increase the scope of the exemption provided by Section 3701 prior to its amendment by P.L. 86-346 is also evidenced by the explicit *exclusion* from the expanded exemption provisions of Section 3701 which is provided for "nondiscriminatory franchise or other nonproperty taxes in lieu thereof . . . and estate or inheritance taxes." It is apparent from the existence of such special exclusions from the expanded exemption that Congress, in enacting P.L. 86-346, fully realized the impact of P.L. 86-346, considered the limitations which it determined should be imposed on the broad language of P.L. 86-

346 and specifically set forth those limitations in the form of special exclusions from the exemption of certain forms of taxation. The existence of these exclusions from the exemption provisions of Section 3701, as amended by P.L. 86-346, constitutes an affirmation by Congress of the application of the provisions of P.L. 86-346 to all forms of taxation *not* excepted. *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980); *TVA v. Hill*, 437 U.S. 153 (1978); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263 (1839).

Significantly, each of the types of taxes which Congress specifically excluded from the expanded exemption provisions of P.L. 86-346 had been previously held by this Court to be excluded from the exemption language of Section 3701 as it existed prior to the enactment of P.L. 86-346. *Society for Savings v. Coite*, 73 U.S. (6 Wall.) 594 (1968); *Werner Co. v. Director of Taxation*, 350 U.S. 492 (1956) (nondiscriminatory franchise taxes); *Greiner v. Lewellyn*, 258 U.S. 384 (1922); *Plummer v. Coler*, 178 U.S. 115 (1900) (inheritance taxes). Therefore, it is apparent that Congress was well aware of the judicially created exclusions from the exemption provided by Section 3701 as determined by this Court prior to the enactment of P.L. 86-346 and nevertheless determined to specifically preserve certain of those exclusions while generally expanding the scope of the exemption language to secure greater marketability for United States obligations.

However, Congress did *not* see fit to preserve the judicially created exclusion from the exemption of United States obligations in the computation of bank shares taxes.

The Texas Courts primarily based their decision that P.L. 86-346 did not apply to the Texas bank shares tax on their determination that the exclusion of bank shares taxes

from the exemption language of Section 3701 was statutorily provided for in Section 5219 of the Revised Statutes of the United States, 12 U.S.C. §548 (1957), as in effect in 1959. The Texas courts concluded that since a statutory exclusion from the exemption for bank shares taxes was in existence when P.L. 86-346 was enacted (Section 5219 was extensively revised in 1969), Congress did not consider it necessary to specifically reiterate that exclusion in P.L. 86-346, but rather introduced P.L. 86-346 with the clause, "Except as otherwise provided by law." This determination by the Texas courts is clearly erroneous.

First, as previously stated, the clause, "Except as otherwise provided by law" was not part of Section 3701 as enacted and has never been enacted into positive law. Second, the exclusion from the exemption for bank shares taxes has never been based on the language of Section 5219 which merely authorized the states to impose shares taxes on national banks, but was judicially created, the same as the exclusions from the exemption for the other types of taxes which are specifically excluded from the broadened exemption effected by P.L. 86-346. *Des Moines v. Fairweather,* 263 U.S. 103 (1923); *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573 (1866).

Section 5219, as in effect in 1959, provided *only* that states could impose a tax on the shares of national banks. Section 5219 did *not* state in any manner that the value of U.S. obligations could be included in the computation of bank shares taxes. Rather, the inclusion of U.S. obligations in the computation of such taxes was based on the long-standing distinction which the courts have made between a tax on a shareholder's property rights in a share of a corporation and a tax on the assets of the corporation under-

lying the shares of the corporation. *Des Moines v. Fairweather,* supra; *Van Allen v. The Assessors,* supra.

If Congress had intended to exclude bank shares taxes from the expanded exemption provided by Section 3701, as amended by P.L. 83-346, it would have specifically done so, in the same manner in which it excluded "nondiscriminatory franchise or other nonproperty taxes in lieu thereof . . ."

Point III

The Improper Interpretation of Section 3701 by the Texas Courts Results in Increased Borrowing Costs to the Federal Government and Renders Section 3701 Violative of Article I, §8, Clause 2 of the Constitution of the United States

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This Court decided in *Weston v. City Council of Charleston,* 27 U.S. (2 Pet.) 449 (1829), that obligations of the United States government are immune from state taxation under the "Borrowing" Clause of the United States Constitution, Article I, §8, Clause 2, and the settled constitutional doctrines announced in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). This immunity recognizes that the state taxation of United States obligations adversely affects the marketability of those obligations by increasing their market price, thereby rendering them less attractive to purchasers. *Missouri Insurance Company v. Gehner,* 281 U.S. 313 (1930).

Banks such as Petitioner and your Amicus hold substantial amounts of United States obligations of many types and descriptions. The decision of the Texas Courts, if up-

held, will adversely affect the marketability of United States obligations by effectively reducing the yield of such obligations held by banks. This results in United States obligations being less attractive investments for banks than would otherwise be the case. Thus, the ability of the federal government to borrow money is hindered and burdened by the inclusion of the value of United States obligations and interest thereon held by banks in the computation of a state bank shares tax.

The imposition of such a burden on the marketability of United States obligations is clearly contrary to Article I, §8, Clause 2 of the United States Constitution and related decisions of this Court. *National Life Insurance Co. v. United States,* 277 U.S. 508 (1928).

IV.
CONCLUSION

For the foregoing reasons, your Amicus respectfully urges that the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas be reversed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The State of Georgia has for many years levied a bank share tax that is similar to the tax which is in issue in this proceeding. Taxing officials of the State of Georgia are appellees in *Bartow County Bank, et al. v. Bartow County Board of Tax Assessors, et al.*, No. 81-1834 (appeal docketed April 5, 1982), which presents the same issue as the case *sub judice*. Pursuant to Rule 36(4) of the Rules of this Court, the consent of the parties to the filing of this brief is not required.

SUMMARY OF ARGUMENT

It is perfectly proper for states to impose taxes on banks and other corporate entities measured by the value and income attributable to U.S. obligations. This is because any state which wishes to include U.S. obligations held by banks and corporations, or their interest, in the tax base is free to do so, provided only that certain formalities regarding the nature of the tax are observed. Such taxes affect the marketability of U.S. obligations the same as a share tax, so while the question raised by this case is substantial as a matter of statutory construction, its future economic significance for taxpayers, states and the United States is likely to be negligible. Accordingly, while Petitioners and their supporting *amici curiae* attempt to buttress their position through repeated references to the Borrowing Clause and the virture in preventing state interference with the conduct of federal functions, it is easily seen that these considerations are without substance in the context of this case.

The question, therefore, is whether Congress, when it amended R.S. § 3701 (31 U.S.C. § 742) in 1959, decreed that states levying bank share taxes would have to shift to bank franchise taxes if they wished to continue to include U.S. obligations in the tax base. Given the economic indistinguishability of these taxes from the viewpoint of the United States, such an intent would be peculiar in the extreme, and the legislative history makes it clear that the amendment was aimed at one state's individual income tax, rather than at bank share taxes.

Petitioners and their supporting *amici curiae* lay heavy emphasis on the "plain meaning" of the 1959 amendment, and argue that Congress' failure expressly to preserve bank share taxes in the 1959 text is dispositive here. This

argument ignores the well-established rule that statutes are construed in light of conditions existing at the time of their enactment, *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976), and the rule that, where there is no clear intention otherwise, a specific statute is not controlled or nullified by a general one, regardless of the priority of enactment. *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976).

In determining the contours of the 1959 amendment, a generalized provision encompassing an indeterminate variety of taxes and all possible holders of federal securities, it is therefore necessary to consider § 41 of The National Bank Act of 1864 and its successors, R.S. § 5219 and 12 U.S.C. § 548 (as it existed in 1959), which have been construed by this Court as consenting specifically to state taxation of bank shares, without making any allowance for U.S. obligations held by banks. *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866); *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902). Bearing in mind the situation existing in 1959, the principles of statutory construction indicate that the Texas bank share tax was not invalidated in 1959 and remains fully valid and enforceable today.

If, contrary to our position, it is held that Congress has prohibited taxation of U.S. obligations via bank share taxes, a subsidiary question will arise as to whether and to what extent prohibited taxation may have occurred. The Texas banks (and the Georgia banks in No. 81-1834) appear uniformly to claim a straight deduction of the value of all of their U.S. obligations from the amount that would otherwise constitute taxable net worth, but we submit that this would be grossly excessive. No deduction should exceed the extent to which U.S. obligations are shown to be present in the tax base, a determination

which can best be made upon remand with appropriate guidance from this Court.

ARGUMENT

I. R.S. § 3701 (31 U.S.C. § 742) DOES NOT REQUIRE ANY DEDUCTION OF THE VALUE OF U.S. OBLIGATIONS WHEN BANK SHARE TAX LIABILITY IS COMPUTED.

The principal question presented by this case is whether the Texas bank share tax statute violates the 1959 amendment to R.S. § 3701 (31 U.S.C. § 372), by failing to provide any deduction of the value of U.S. obligations in the computation of the tax. The answer to this question lies in an investigation into the situation facing the Congress in 1959, and into Congress' response. Applying settled principles of statutory construction to the results of this investigation, it is clear that the Texas statute does not violate 31 U.S.C. § 742.[1]

A. Congress And State Taxation Of U.S. Obligations In General

Congress has traditionally and properly exercised active control over state taxation of U.S. obligations, permitting some forms of such taxation and prohibiting others. Although intergovernmental tax immunity has a constitutional dimension, *M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819), the authority of Congress to permit or prohibit state taxation of U.S. obligations as it sees fit has long been settled. *See National Bank v. Common-*

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[1] R.S. § 3701 was codified as 31 U.S.C. § 742 during the years in issue, and will be generally referred to as such in this brief, following the practice of this Court. *Society for Savings v. Bowers*, 349 U.S. 143 (1955). Recently Title 31 was reformulated "without substantive change" and R.S. § 3701 became 31 U.S.C. § 3124(a).

wealth, 9 Wall. (76 U.S.) 356 (1869); T. Cooley, 2 *The Law of Taxation* § 606, at 1287 (4th Ed. 1924).[2]

As the United States recognizes in its brief, U.S. Brief 15 & note 24, Congress has for more than a century permitted states to tax corporations, including in the taxable measure obligations of the United States or the interest on such obligations. Concerning bank share taxes, Congress starting in 1864 was held to have consented specifically to taxation of bank shares without making any deduction for U.S. obligations held by banks.

Nobody in this case has argued, nor could anyone seriously argue, that Congress has set its face against state taxation of U.S. obligations held by banks, whether to decrease the borrowing costs of the government or for any reason. It is undisputed that all states remain free to burden U.S. obligations held by banks via franchise taxes. Indeed, such taxes, first authorized in 1926, 44 Stat. 1, have long been the dominant method by which states tax banks.[3] These facts make it plain that the 1959 amendment to 31 U.S.C. § 742 did not and could not form part of any coherent plan to increase the attractiveness of U.S. obligations for banks.

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[2] *Amicus curiae* Dale National Bank's reliance upon the Borrowing Clause, Dale Brief 11-12, is therefore clearly misplaced.

[3] *See* "Technical Aspects of the District's Tax System," House of Representatives Committee on the District of Columbia, December 1, 1978, 495-501. It appears that only seven states currently levy share taxes. *See* O.C.G.A. § 48-6-90 (Ga. 1982); La. Rev. Stat. Ann. §§ 47:8, 47:1967; Nev. Rev. Stat. Ch. 367.020-070; Ohio Rev. Code Ann. §§ 5709.04, 5711.01(b)(3): Pa. Stat. Ann. Tit. 72, §§ 7701 *et seq.*, Tex. Prop. Tax Code (1982) §§ 21.09, 22.06, 23.11 and 25.14; W. Va. Code Ch. 11-3-14, 11-3-14a. Montana shifted from its share tax to a franchise tax measured by net income (including income from U.S. obligations) within months of the decision in *Montana Bankers Ass'n. v. Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978). *See* 1979 Mont. Laws 1729.

Despite its creation and preservation of methods by which states can effectively tax U.S. obligations in the hands of banks and other corporations, Congress has been vigilant in its efforts to suppress state taxes which burden U.S. obligations in the hands of individuals. We are aware of no exception to the prohibition of 31 U.S.C. § 742, whether contained in the code section itself or in other statutes, which has ever authorized a state to tax an individual based upon his ownership of exempt U.S. obligations. Given this background, Congress' reaction was predictable when, in 1959, the Treasury Department reported that the State of Idaho claimed the right to tax individuals in a way that "could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals. . . ." "Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings before the Committee on Ways and Means, House of Representatives, 86th Cong., 1st Sess. 72 (1959).

The Treasury did not doubt that it would prevail, were it to challenge the Idaho tax in court under the existing statute, but wished to avoid litigation. It is ironic that an amendment which was introduced to avoid litigation, and which remained in effect for 17 years before any suggestion was heard that it might affect bank share taxes, should now be thought so uncertain in its meaning that it requires plenary consideration by this Court.

B. The Conditions Existing At The Time 31 U.S.C. § 742 Was Amended In 1959.

An understanding of the 1959 amendment to 31 U.S.C. § 742 requires an understanding of the conditions existing at the time of its enactment. It is practically undisputed in this case that a study of the prior law is necessary for an appreciation of Congress' interest in 1959 (the briefs for

Petitioners and The United States discuss the prior law at length), and it is settled that statutes are to be construed in this light. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976).

Despite the value in a comprehensive review of the constitutional and statutory background to state taxation of banks and their federal securities holdings,[4] in the interest of brevity this brief will limit its discussion to the most pertinent single circumstance affecting construction of the 1959 amendment: Congress' decision to consent to state taxation of bank shares, without making any deduction for the value of U.S. obligations held by banks. This Court found that such consent was given by § 41 of the National Bank Act of 1864, c. 106, 13 Stat. 111, in the leading case of *Van Allen v. Assessors*, 3 Wall. (70 U.S.) 573 (1866). This consent was preserved in successor statutes, including R.S. § 5219 and 12 U.S.C. § 548, reaffirmed in later cases such as *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902), and *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923), and remained in effect when Congress enacted the 1959 amendment to 31 U.S.C. § 742.

Petitioners and *amicus curiae* Dale National Bank profess to find no consent in the terms of 12 U.S.C. § 548, as it existed in 1959, or its predecessor enactments. According to Petitioners "the basis of the *Van Allen* rule was only that a tax upon shares is not upon the bank's assets." *See* Brief for Petitioners 22; *See also* Brief of Dale

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[4] The Georgia Supreme Court undertook a comprehensive review, starting with *M'Culloch v. Maryland*, *supra*, in *Bartow County Bank v. Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S.E. 2d 920 (1982), and a separate comprehensive review appears in E. Symons, "State Taxation of Banks: Federal Limitations," *The Banking Law Journal* 99: 817-842 (October 1982). Both of these reviews support the conclusion that the tax statute is valid.

National Bank 10.[5] If this were true it would change completely a proper analysis of the 1959 amendment to 31 U.S.C. § 742. There appears, however, to be no basis for this view, and Petitioners apparently recognized in their motion for rehearing in the Court below that *Van Allen* was based in part upon Congressional consent. *See Bank of Texas v. Childs*, 615 S.W. 2d 810, 825 (Tex. Civ. App. 1981).

With respect to Petitioners' present inability to find an expression of consent in 12 U.S.C. § 548, it is clear that the meaning of the Code section does not turn on the presence or absence of any particular form of words. This Court in *Van Allen* held that such consent was given, and controlling judicial constructions are as conclusive "as though the meaning as fixed by the Court had been expressed in the statute itself in specific words." *Guaranty Trust v. Blodgett*, 287 U.S. 509, 513 (1933).

Some later cases, particularly those dealing with corporations other than banks such as *Educational Films Corp. v. Ward*, 282 U.S. 379, 390 (1931), refer exclusively to the *Van Allen* distinction between shareholder property and corporate property. Later bank share tax cases, however, usually refer to both holdings. Thus, *Cleveland Trust Co. v. Lander, supra*, 184 at 115, rejected a proposed construction of R.S. § 3701 in part on grounds that it would "nullify" R.S. § 5219. Similarly, *Des Moines*

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[5] The United States appears to take no position on this issue, as it neither acknowledges nor denies that Congress consented to indirect state taxation of U.S. obligations via the bank share tax. *See* U.S. Brief 6, 10-11, 18-19. On the different question of whether 12 U.S.C. § 548 and its predecessors were needed to permit any state taxation of national bank shares, the United States suggests that these statutes were not needed, U.S. Brief 11-12 n. 15, but *People v. Weaver*, 100 U.S. 539, 543 (1879), flatly contradicts this suggestion.

National Bank v. Fairweather, supra, 263 U.S. at 112-114, quotes language from *Van Allen* pertaining to both of its holdings.

Much of the confusion on this point apparently stems from *Society for Savings v. Bowers,* 349 U.S. 143 (1955), a case which discusses only the shareholder property—corporate property distinction as a basis for permitting bank share taxes to burden U.S. obligations. *See* U.S. Brief 11-12 n. 15. Justice Harlan was careful, however, not to suggest that *Van Allen* was limited to this holding:

> This result was reached *in part* on the theory that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets. . . . 349 U.S. at 147 (emphasis supplied).

While The American Bankers Association has filed an *amicus curiae* brief in support of Petitioners, it concedes that "The intent of Congress in enacting the bank share tax statute in 1864 was to provide an exception to the general rule against state taxation of federal obligations. . . ." ABA Brief 13. This is clearly correct, and has a profound influence on the proper construction of the 1959 amendment to 31 U.S.C. § 742.

C. The Meaning Of 31 U.S.C. § 742 Following Its Amendment In 1959.

At the time of its amendment in 1959, 31 U.S.C. § 742 read as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or

under State or municipal or local authority.[6]

The 1959 amendment, Pub. L. 86-346, 73 Stat. 622, added a second sentence to R.S. § 3701, reading as follows:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and

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[6] The introductory phrase was inserted by the revisers of the United States Code in 1926, and does not appear in R.S. § 3701. Because the Court below referred to the introductory phrase as one of two alternative bases for upholding the Texas statute, a dispute has arisen over the effectiveness of such language since Code Title 31 had not been enacted into positive law and therefore remained merely *prima facie* evidence of the law. Although Petitioners and their supporting *amici* place considerable emphasis on this issue, it is something of a tempest in a teapot because both the Court below and the Supreme Court of Georgia made it clear that their decisions did not turn on the proviso. *See Bank of Texas v. Childs*, *supra*, 615 S.W. 2d at 820 ["The same conclusion follows without consideration of the express exception."]; *Bartow County Bank v. Bartow County Board of Tax Assessors*, *supra*, 285 S.E. 2d at 826 n. 6 ["[W]e reach the same conclusion whether or not this statute is introduced by the 'Except . . .' clause."].

Usually, when the authoritativeness of the United States Code is brought into issue, it is because the revisers changed the context (and therefore the apparent meaning) of a statute, or inadvertently codified an obsolete statute. The first situation, relating to context, is typified by *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964), holding that if a codification changes the context of a statute the meaning remains unaffected. This principle applies to enacted codifications as well as unenacted ones, *see Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1922), so it has little to tell us about the difference between the two. In the second situation, involving inadvertent codification of obsolete statutes, it is clear that the Code is in error and it is obviously proper to correct the Code by reference to the Statutes at Large. Thus, in *Stephens v. United States*, 319 U.S. 423 (1943), this Court applied a 1911 jurisdictional statute in preference to the Code, which had overlooked the 1911 statute and erroneously codified an 1897 statute. It was to permit the weeding out of such mistakes over time that Congress enacted the Code as merely *prima facie* evidence of the law in 1926.

except estate taxes or inheritance taxes.

As already stated, the purpose of the amendment was to resolve a dispute between the Treasury Department and the State of Idaho over individual income taxes, without the necessity of litigation. *See* "Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings before the Committee on Ways and Means, House of Representatives, 86th Cong., 1st Sess. 72 (1959); H.R. Rep. No. 1148, 86th Cong. 1st Sess. (1959); S. Rep. No. 909, 86th Cong. 1st Sess. (1959) [reprinted in [1959] U.S. Code Cong. & Ad. News 2769, 2773].

The general language of the amendment is broad, and in form governs all state taxes that consider federal securities' values or interest in the computation of the tax. However, the preexisting language was also unrestricted, and this did not prevent this Court from imposing restrictions on the exemption to conform it to

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The situation presented by the case at bar is fundamentally different from the typical situations described above. It is clear that, while the revisers altered the phrasing of R.S. § 3701 in writing 31 U.S.C. § 742, they captured perfectly the meaning of the prior law. This Court established in *Van Allen v. Assessors*, *supra*, and later cases that the scope of R.S. § 3701 was limited by R.S. § 5219 (the predecessor of 12 U.S.C. § 548). This Court's construction fixed the meaning of R.S. § 3701 the same as if a cross-reference "had been expressed in the statute itself in specific words." *Guaranty Trust v. Blodgett*, *supra*, 287 U.S. at 513. (The introductory phrase may also refer to an 1894 statute, as the United States argues at 19-20 n. 32, but this hardly means that it did not refer to 12 U.S.C. § 548 as well). It follows that the revisers made no mistake in 1926, and production of R.S. § 3701 does not rebut the *prima facie* correctness conferred upon 31 U.S.C. § 742 by Congress in 1926. Act of June 30, 1926, c. 712, § 2(a), 44 Stat. 1. These considerations may explain why both this Court and the Congress have included the introductory phrase when quoting the law in this area. *See Society for Savings v. Bowers*, *supra*, 349 U.S. at 143; [1959] U.S. Code Cong. § Ad. News 2777. In this particular context this Court could properly conclude that 31 U.S.C. § 742 is authoritative.

Congressional intent. *See Smith v. Davis*, 323 U.S. 111 (1944) [holding that open account obligations of the United States are not exempt "other obligations" within the meaning of 31 U.S.C. § 742]. Moreover, prior exemptions prohibiting state taxation of federal securities "in any form" had not been construed to be any broader than R.S. § 3701. *See Plummer v. Coler*, 178 U.S. 115 (1900).

The remainder of the amendment, consisting of its exceptions for corporate franchise, estate and inheritance taxes, confirms that the measure was aimed solely at Idaho's individual income tax. Each of these taxes had been determined to lie beyond the reach of the exemption, as intended by Congress, although there was no specific basis in other statutes for such a determination.[7] Therefore, the amendment's exceptions were necessary to prevent the amendment from altering the law in areas outside of Idaho's individual income tax.

In an effort to show that the 1959 amendment was designed to go beyond the Treasury's dispute with Idaho, and indeed was intended to "substantially expand the exemption of obligations of the United States from state taxation," U.S. Brief 16, the United States in its brief discusses two possible changes wrought by the amendment, besides its supposed effect upon bank share taxes. According to the United States, state gift taxes on gifts of tax exempt U.S. obligations would apparently have been upheld if any had been levied and challenged

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[7] *See Werner Machine Co. v. Director of Taxation*, 350 U.S. 492 (1956), and *Plummer v. Coler, supra.* Franchise taxes levied on banks, measured by net income including income from U.S. obligations, were arguably specifically consented to in 1926, 44 Stat. 223, but this consent would not extend to such taxes on non-bank corporations. *See First Agricultural National Bank v. State Tax Commissioner*, 392 U.S. 339, 346 (1968).

prior to 1959, but would probably now be invalid. Moreover, state income taxes on gains from the sale of U.S. obligations, had any been levied prior to 1959, would presumably have been upheld then, but not any longer. U.S. Brief 16.

The United States gives no example of either such tax, so the intent to "substantially expand the exemption" apparently consisted in closing loopholes of which no state had ever taken advantage. Moreover, there is no suggestion that anyone even suspected that these loopholes ever existed (assuming they did exist), either prior to 1959 or in the following 23 years. Closing such minor and hypothetical loopholes does not "substantially expand" the exemption of U.S. obligations from state taxation, and it is unreasonable to impute to Congress any intention in this regard, especially without any support from the legislative history.[8]

In any event, the examples relied upon by the United

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[8] J. & W. Hellerstein, *State and Local Taxation* (4th Ed., 1978) at 938 states, with respect to the 1959 Amendment to 31 U.S.C. § 742, that "the legislative history suggests that the amendment was merely designed to 'clarify' prior law." *Federal Products, Inc. v. Norberg*, 429 A. 2d 447 (R.I. 1981), offers no insight into the intent of Congress in 1959, although it is discussed in this context by the United States. U.S. Brief 16-17. The Rhode Island corporate income tax excludes the income of U.S. obligations, so the question in *Norberg* was limited to allocation of income between states. In the allocation context the inclusion of federal securities' income is as likely to lower Rhode Island's taxes as to raise them, because in many cases a majority of a corporation's federal securities will be held outside of Rhode Island and therefore will lower Rhode Island's claim to corporate income. Therefore, the impact of the inclusion on the attractiveness of U.S. obligations is apt to be nil and could conceivably be adverse. No intent to enhance the marketability of U.S. obligations can fairly be attributed to this effect of the 1959 Amendment.

States are inapposite here, because gift taxes and individual income taxes did not have the benefit of 12 U.S.C. § 548 or any other statute expressing Congress' consent to state taxation measured by the value of U.S. obligations. Therefore, even if the changes hypothesized by the United States supported the claim that the 1959 amendment was intended to expand substantially the exemption afforded U.S. obligations, it would still be necessary to construe the amendment to harmonize it, if possible, with 12 U.S.C. § 548.

Most of the "plain meaning" analysis advanced by Petitioners and their supporting *amici curiae* is inapplicable to the case at bar, because when 31 U.S.C. § 742 was amended in 1959 another statute was in effect which dealt specifically with one aspect of state taxation measured by federal securities' values. The impact of 12 U.S.C. § 548 upon the proper contours of the 1959 amendment was properly recognized by the Court below and by the Supreme Court of Georgia in *Bartow County Bank v. Bartow County Board of Tax Assessors, supra.*

The Court below adopted, as its principal authorities in this area, five of this Court's decisions.[9] In the four briefs filed in this Court by Petitioners and their supporting *amici curiae*, there is, however, not a single reference to any of these five cases.

Radzanower v. Touche Ross & Co., supra, one of the five cases, states the specific versus general rule of statutory construction as follows:

It is a basic principle of statutory construction that a

[9] *Busic v. United States*, 446 U.S. 398 (1980); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102 (1974); *Morton v. Mancari*, 417 U.S. 535 (1974), and *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961). *See Bank of Texas v. Childs, supra*, 615 S.W. 2d at 820-21.

> statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-551.

The application of this principle to this case is clear because 12 U.S.C. § 548 (1959), as construed by a line of cases beginning with *Van Allen v. Assessors*, *supra*, specifically consented to state taxation of bank shares without deducting the value of bank owned federal securities. The exemption statute as amended in 1959, in contrast, covers a very generalized spectrum including an indeterminate variety of taxes and all possible holders of federal securities.

The 1959 amendment can properly be construed as affecting bank share taxes only if it is demonstrated that Congress clearly intended this specific result. Neither Petitioners nor any of their supporting *amici curiae* even argues that Congress had such an intent. Applying settled principles of statutory construction, the question of what Congress intended in 1959 admits of only one answer: Congress meant to clarify existing law concerning state taxation affecting U.S. obligations, and did not intend a "technical proposal"[10] to alter its century-old judgment concerning bank share taxes. It having been shown that bank share taxes were not affected by 31 U.S.C. § 742 upon its amendment in 1959, we turn to the idea, advanced principally by The American Bankers Ass'n, that the Code section changed its meaning between 1959 and the years in issue in this case.

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[10] This term is from President Eisenhower's request to the Congress in 1959. 105 Cong. Rec. 10163-64 (1959).

D. The Meaning Of 31 U.S.C. § 742 During The Periods In Issue.

Between 1959 and the periods in issue in this case, 31 U.S.C. § 742 was not amended or even reenacted without change by the Congress. Petitioners and their supporting *amici curiae*, when they ignore 12 U.S.C. § 548 as it existed in 1959 in favor of 12 U.S.C. § 548 as it has existed following its revision (beginning in 1969), in essence argue that the contours of 31 U.S.C. § 742 changed at a time when Congress did not have 31 U.S.C. § 742 under consideration.

As a general matter, however, it is improper to construe a statute with reference to events occurring after its passage. The Court of Appeals for the District of Columbia Circuit stated this principle in *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), as follows:

> As the Supreme Court recognized in *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590 (1961), the history of subsequent legislative activity is not useful in determining the meaning of the original legislation when enacted. 'Statutes are construed by the Courts with reference to the circumstances existing at the time of passage.' *Id.* Otherwise, the meaning of a statute might never be settled, even though the statutory language had never been changed or reenacted with a different intent. 555 F.2d at 952n.41.[11]

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[11] If one statute specifically incorporates a second statute, then it may sometimes be inferred that a change in the second statute, in this case 12 U.S.C. § 548, was intended to change the content of the first statute, in this case 31 U.S.C. § 742. No such inference may properly be drawn in this case, for several reasons. First, the contours of U.S.C. § 742, as established in 1959, excluded bank shares taxes for reasons other than the code section's "Except as otherwise provided by law" clause. These reasons involve considerations of legis-

Absent proof of an intention on the part of Congress to demolish the share tax, and it is clear that Congress had no such intention in 1969 or any other year, *see Bank of Texas v. Childs, supra*, 615 S.W. 2d at 823-26, it is proper to ask what purpose would be served by the proposed rule. Justice Stone, writing for himself, Justice Holmes and Justice Brandeis, recognized the relevance of this question in his dissent in *Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929), as follows:

> It would seem that only considerations of public policy of weight, which appear to be here wholly wanting, would justify overturning a principle so long established. It has survived a great war, financed by the sale of government obligations; and it has never been suggested that in any practical way it has impaired either the dignity or credit of the national government. 279 U.S. at 637.[12]

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lative intent which were discussed previously and need not be repeated here. Second, the "Except as otherwise provided by law" reference in 31 U.S.C. § 742 (assuming it is actually a part of the law, a point Petitioners hotly dispute) is insufficiently specific. It does not refer to 12 U.S.C. § 548 by name, and it also refers to an 1894 statute, as the Brief for The United States points out at 19-20 n. 32. Third, the "Except as otherwise provided by law" clause could arguably be read as a frozen cross-reference, retaining the language of 12 U.S.C. § 548 prior to its revision in 1969. *See Village of Aurora v. Commissioner of Taxation*, 217 Minn. 64, 14 N.W. 2d 292, 300 (1944) [holding a reference not to be frozen, but only because the legislative intent was clearly to the contrary]. Finally, an investigation into the intent of Congress in 1969 makes it clear that there was no intent to restrict traditional methods of bank taxation, including the share tax. *See Bank of Texas v. Childs, supra*, 615 S.W. 2d at 823-26. Moreover, nothing in the language of 12 U.S.C. § 548, as it was amended in 1969, suggests that Congress was requiring state share tax assessors to institute inquiries into bank investments, something that assessors had not been required to do since 1864. *See Van Allen v. Assessors, supra*.

[12] In determining the weight to be given to Justice Stone's dissent, it should be noted that this Court has declared that the decision in *Macallen Co. v. Massachusetts* no longer has precedential value. *See*

It is difficult to discern what advantage would flow to the United States from the destruction of state bank share taxes, given the continued availability of bank franchise taxes and their unquestioned ability to subject U.S. obligations to state tax burdens. Intergovernmental tax immunity involves the rights of states and the national government to function with a minimum of interference each with the other. Once a balance has been struck and maintained for more than a century, as in the case of bank share taxes, it is not to be discarded simply because new words are used to express old ideas. *Robertson v. Railroad Labor Board*, 268 U.S. 619, 627 (1925).

There is no reason to conclude that the meaning of 31 U.S.C. § 742 has changed since its amendment in 1959. It follows that the Texas bank share tax remained fully valid and enforceable throughout the periods in issue in this case.

II. IN THE CONTEXT OF A NET WORTH-BASED BANK SHARE TAX, ANY DEDUCTION OF U.S. OBLIGATIONS SHOULD BE LIMITED TO THE EXTENT TO WHICH THE OBLIGATIONS ARE SHOWN TO BE PRESENT IN NET WORTH.

The Petitioner banks and *amici curiae* American Bankers Ass'n and Dale National Bank in their respective briefs assume that nothing less than a full deduction of the value of U.S. obligations present in gross assets will satisfy 31 U.S.C. § 742. *See* Brief for Petitioners 8; Brief of American Bankers Ass'n 2,4; Brief of Dale National

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United States v. City of Detroit, 355 U.S. 466, 472 (1958); *Phillips Chemical Co. v. Dumas Independent School District*, 371 U.S. 376, 382 (1960).

Bank 5.[13] Apparently these banks believe that no issue exists in this case with respect to remedy, and expect this Court's opinion to mandate the grant of such relief upon remand. This was, after all, the measure of relief granted in *Montana Bankers Ass'n v. Montana Department of Revenue*, *supra*, a case on which all of the banks rely.

Examination of the opinion in *Montana Bankers Ass'n v. Montana Department of Revenue*, *supra*, 580 P.2d at 911, 913, makes it clear, however, that the Montana Supreme Court gave no thought to the possible existence of an issue respecting the proper measure of relief. We submit that had this question been brought to the attention of the Montana Supreme Court, it might well have limited the deductions granted by the trial court, or remanded the case for a determination of the proper measure of relief under the facts shown in the record.

Assuming the Texas tax in issue is actually based upon net worth (a point the Texas taxing authorities do not concede), it is clear that the relief claimed by Petitioners is grossly excessive, and that no deduction should exceed the extent to which U.S. obligations are shown by the bank to be present in net worth. The burden lies upon the banks because one who wishes to attack a statute in court is required to show it has personally been injured by the statute. *United States v. Raines*, 362 U.S. 17, 21 (1960). This principle was applied in the bank share tax context by this Court in *Supervisors v. Stanley*, *supra*, 165 U.S. at 311.

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[13] The Georgia bank appellants in *Bartow County Bank v. Bartow County Board of Tax Assessors*, No. 81-1834, make a similar claim, as the opinion of the Georgia Supreme Court makes clear. *See* 285 S.E. 2d at 922-23. The Georgia banks claimed, in the alternative, that the Georgia tax should be declared completely invalid, but such a remedy was rejected by this Court in *Supervisors v. Stanley*, 165 U.S. 305 (1881).

A simple illustration shows that, while the banks' proposal to take a straight deduction would be appropriate if the tax were measured by gross assets, a straight deduction will practically never be proper in the context of a net worth tax. This point was made by Justice Stone, writing for himself and Justices Holmes and Brandeis, in his dissent in *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313, 322-31 (1930).[14]

Suppose that an individual obtains a bank charter and invests $1 million of his own capital, with which the bank makes loans. The share tax will be based on the capital value of $1 million, and will clearly be proper. Then a depositor opens an account with $1 million, which the bank uses to purchase U.S. obligations. The bank's capital is still $1 million (assets of $2 million less the deposit liability of $1 million), but according to the Petitioner banks the share tax value has dropped to zero (assets of $2 million less two deductions, one for the deposit liability of $1 million and the other for the "U.S. obligations deduction" of $1 million). Acceptance of the Petitioners' position would not only shield the U.S. obligations from the share tax, it would make the U.S. obligations shelter the bank's otherwise taxable net worth. In the example it is clear that the U.S. obligations are deducted twice, and it is this double deduction that wipes out the share tax.

The straight deduction assumes that the $1 million in assets that gives rise to the tax base is attributable exclusively to the U.S. obligations, and not at all to the

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[14] With regard to the weight to be given this dissenting opinion, we note that this Court repudiated the *Gehner* majority's constitutional holding in its very next term. *See United States v. Atlas Life Ins. Co.*, 391 U.S. 233, 245 n. 16 (1965).

loan portfolio or other taxable assets. This is, however, a purely arbitrary assumption, and, so long as the dollar value of a bank's liabilities exceeds the dollar value of its U.S. obligations, there is no necessary reason to conclude that any of the capital account is attributable to U.S. obligations.

The United States does not discuss the issue of remedy in its brief, but we discern support for our position in the statement that "The 1959 amendment exempts bank shares from state taxes insofar as their value is enhanced by federal obligations held by banks." U.S. Brief 14. The deduction of liabilities from gross assets to produce net worth will ordinarily remove U.S. obligations from the reach of the tax, and to this extent the United States' condition—"insofar as their value is enhanced by federal obligations"—requires that the deduction be limited.[15]

Accordingly, if this Court rules contrary to our position, that 31 U.S.C. § 742 does not prohibit bank share taxes measured in part by U.S. obligations held by banks, it should remand the case for a determination of the extent to which U.S. obligations are actually present in the net worth or other basis for valuation of the shares.

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[15] Georgia Bankers Ass'n filed an *amicus curiae* brief in the Georgia Supreme Court in *Bartow County Bank v. Bartow County Board of Tax Assessors*, *supra*. At 21 it conceded that, for purposes of 31 U.S.C. § 742, "it may be argued from a theoretical standpoint that some amount less than the full value of federal securities should be deducted." The United States notes that full deductions were allowed in some Civil War bank tax cases, U.S. Brief 9. This does not undercut the analysis, because in those days all of the capital of the bank was generally invested in U.S. obligations. *See, e.g., Van Allen v. Assessors*, *supra*, 3 Wall. (70 U.S.) at 582.

CONCLUSION

For the reasons stated we urge this Court to affirm the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

Respectfully submitted,

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NO. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, et al.,
Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District Of Texas In Dallas

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STATUTORY PROVISIONS

31 U.S.C. § 742 prior to its amendment in 1959

Except as otherwise provided by law, all stocks, bonds, Treasury notes and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

31 U.S.C. § 742 after its amendment in 1959

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

12 U.S.C. § 548 prior to its amendment in 1969

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other

moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own law or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located

and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. § 5219; Mar. 4, 1923, c.267, 42 Stat. 1499; Mar. 25, 1926, c.88, 44 Stat. 223.

12 U.S.C. § 548 after its amendment in 1969

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Tex. Rev. Civ. Stat. Ann. art. 7166 (1960)
Repealed effective January 1, 1982

Every banking corporation, State or national, doing business in this State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank;

and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

Texas Property Tax Code § 11.02(d)
effective January 1, 1980

This state has jurisdiction to tax stock in a banking corporation that is incorporated in this state or, if the bank is a national bank, is located in this state.

Texas Property Tax Code § 23.11
effective January 1, 1982

(a) The stock of a banking corporation that is located in this state is appraised by subtracting the market value of the real property owned by the bank from the actual cash value of the bank's stock.

(b) Real property owned by a banking corporation subject to this section is appraised in the same manner as other real property. . . .

Texas Property Tax Code § 25.14
effective January 1, 1982

Stock in a banking corporation may be listed in the name of the bank as agent for its stockholders.

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STATEMENT OF INTEREST

The City of Houston, Texas submits this Amicus Curiae brief as a political subdivision of a state, pursuant to Rule 36, subsection 4, of the Supreme Court Rules.

The City of Houston, Texas, collects taxes for itself and for the use and benefit of the Houston Independent School District. Bank shareholders have been paying ad valorem taxes on their shares for over fifty years to the City and the School District. Typically, and for the sake

of convenience, each bank would annually forward a single payment on behalf of all its shareholders. As will be shown below, banks in Texas are now designated as collection agents for these taxes by force of statute.

Justification for this tax exists under the sound theory that property which enjoys the benefits and protection provided by local government should be made to contribute to the expenses incident in providing those services. The trend to improve equality and uniformity in taxation initiated by both legislative and judicial bodies throughout the United States should not be thwarted by an adverse decision in this case. The high cost of providing a sound economic environment for profit making enterprises to operate in should be shared equally by all members of a community. To create tax immunity where none existed before for such a large class of taxpayers would either shift an undue burden on the remaining taxpayers within a community or impose fiscal calamity on local governments. The holding advocated by the Petitioners would cause a revenue loss to the City of Houston and the Houston Independent School District of approximately $13 million dollars in one year. This immediate impact would be further magnified if local governments were required to refund prior years' taxes if in fact this Court would hold that they were illegally assessed. It is because of these dire consequences that the City of Houston is compelled to appear as your Amicus Curiae.

SUMMARY OF ARGUMENT

It is a well-settled proposition of Constitutional law that obligations of the United States are immune from taxation by either state or local governments. This "rule of immunity" is now embodied in 31 U.S.C. § 742. In

contrast, Congress has expressly consented to local taxation of bank shares on the theory that such a tax is not an imposition upon federal obligations owned by a bank but is, instead, a tax upon a separate property interest held by a shareholder. 12 U.S.C. § 548. Not until the Montana Supreme Court reached a contrary conclusion in *Montana Bankers Association v. Montana Department of Revenue,* 580 P.2d 909 (Montana 1978) did an actual dispute arise. The Court therein held that federal obligations must be deducted under the current wording of Section 742. In conformity with the decision of the Texas Court of Civil Appeals, in *Bank of Texas v. Childs,* 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.), your Amicus submits that the reasoning of the Montana Court was ill-founded and that the Texas bank share tax fully complies with 31 U.S.C. § 742 and 12 U.S.C. § 548. Therefore, the Texas tax on bank shares is authorized by the statutes and should be upheld as such.

I. INTRODUCTION

A. TAXATION OF BANK SHARES UNDER FEDERAL STATUTES AND THE *BOWERS* CASE

In *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819) and again in *Weston v. Charleston,* 7 U.S. (2 ~~In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316~~ Pet.) 449 (1829), this Court long ago concluded that obligations of the federal government must remain immune from direct taxation by the states. By 1955, at the time of the Court's decision in *Society for Savings in the City of Cleveland v. Bowers,* 349 U.S. 143 this "rule of immunity" was embraced in 31 U.S.C. § 742 (hereinafter referred to as Section 742) which read as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Four years later in 1959, Congress amended the statute by adding the following sentence:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

In contrast to the prohibition against direct taxation of federal obligations, Congress did consent to taxation of bank shares according to the opinion in *Van Allen v. The Assessors,* 70 U.S. (3 Wall.) 573 (1866). All of the capital of the bank in that case was invested in federal securities. The Court reasoned that a tax upon the shares was not a direct tax upon the securities themselves but was, instead, a tax upon a separate property interest:

> . . . the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after

> the payment of its debts. This is a distinct, independent interest on property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States. . . . 3 Wall. at 583.

In the opinion of the Court below in *Bank of Texas v. Childs, supra,* Congressional consent to taxation of bank stock may be found today in 12 U.S.C. § 548, which provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

In the *Bowers* case, *supra,* this Court resolved the apparent conflict of the "rule of immunity" with Congressional consent to taxation of bank stock, by means of the following proposition: If a tax is based in part upon the inclusion of federal obligations, and if a court were to conclude that the tax is imposed upon the bank's shareholders rather than the bank itself, then the tax will not be held to violate either 31 U.S.C. § 742 or the "Borrowing" and "Supremacy" Clauses of the U. S. Constitution.

This Court in *Bowers* formulated several tests to determine whether the tax under scrutiny is imposed upon the bank or upon the bank's shareholders. The most pertinent are the following:

1. Does the statute in question contain any wording expressly imposing the tax on the shareholders?
2. Does the statute allow the taxing authority to collect the tax directly from the shareholders?
3. May the bank be described as a mere tax-collecting agent?

B. TEXAS STATUTORY SCHEME FOR THE TAXATION OF BANK STOCK

The Texas statutory scheme for the taxation of bank stock may be outlined in the following manner.

Prior to the enactment of the Texas Property Tax Code, taxation of bank shares was governed by Article 7166 (reproduced in full following the Table of Authorities). This particular statute was repealed on January 1, 1982 as a part of the over-all codification of the State's property tax laws. Several individual provisions in the new Tax Code may be said to have supplanted Article 7166. Section 11.02(d) of the Code became effective on January 1, 1980. It provided:

> This state has jurisdiction to tax stock in a banking corporation that is incorporated in this state or, if the bank is a national bank, is located in this state.

Two other pertinent provisions of the Code became effective on January 1, 1982:

Section 23.11. Banking Corporation

> (a) The stock of a banking corporation that is located in this state is appraised by subtracting the market value of the real property owned by the bank from the actual cash value of the bank's stock.
>
> (b) Real property owned by a banking corporation subject to this section is appraised in the same manner as other real property. . . .

Section 25.14. Stock in Banking Corporation

> Stock in a banking corporation may be listed in the name of the bank as agent for its stockholders.

It may be concluded, from a reading of the above provisions, that the statutory scheme for the taxation of bank stock in Texas satisfies the tests in *Bowers*, both before and after the enactment of the State Property Tax Code.

More specifically, it is seen that banks are expressly designated as collection agents for shareholders in § 25.14. Furthermore, Article 7166 clearly designated the shareholder, in the event of non-payment, as the party who would be considered "in default in the payment of his taxes upon the [shares]." This statute went an additional step further by expressly prohibiting any bank from paying dividends to a shareholder who was in actual default. Nor could a bank even permit the transfer, on its own books, of any share owned by one who was delinquent in the payment of taxes upon that particular share. The *Bowers* tests, therefore, are clearly satisfied.

C. THE 1959 AMENDMENT TO 31 U.S.C. § 742: EXTENSION OR CLARIFICATION OF EXISTING LAW

In *Montana Bankers Association v. Montana Department of Revenue*, 580 P.2d 909 (Montana 1978), the Supreme Court of the State of Montana expressed the opinion that even if a disputed tax is able to satisfy the several tests formulated by the *Bowers* Court, i.e., even if it is held that the tax is imposed upon the bank's shareholders rather than the bank itself, the tax would nevertheless be in violation of 31 U.S.C. § 742 as amended in 1959 where the tax is based in part upon the inclusion of federal obligations.

With respect to such a tax, this Court in *Bowers* held that the important question was whether the tax was im-

posed on the bank itself or on the bank's shareholders. The Montana Court, on the other hand, felt that the answer to the above question did not resolve the problem under the 1959 amendment to 31 U.S.C. § 742. Instead, the Montana Court concluded that if a tax is in fact based in part upon the inclusion of federal obligations, even if the tax is imposed on the shareholders, then a deduction for the value of the obligations must be allowed under the 1959 amendment.

The linchpin of the Montana opinion is the Court's apparent belief that the 1959 amendment represented a departure from the existing law, or, at the least, a significant statutory *extension* of the existing exemption law. If the Montana Court was incorrect in this particular assumption and if, instead, the 1959 amendment merely represented a statutory *clarification* of the existing law, then the result reached by the Montana Court was also incorrect. Certainly, the burden of persuasion on this question ought to lie with the advocate who argues "extension." The following arguments may be advanced in support of the "clarification" position:

1. The very Senate Report which the Montana Court found comfort in quoting from was entitled "Clarifying Exemption of U. S. Obligations from State or Local Taxation." It was not entitled "Extending the Exemption . . ." or other such words.

2. The example cited in the Senate Report of a "wrong" to be remedied is that of a state income tax which includes interest on federal obligations in its computation. The Senate apparently felt that a statutory pronouncement was necessary as a warning to states to refrain from any such exaction. Arguably, however, as will be shown below, such an exaction

would have been forbidden by the *Bowers* Court four years earlier.

3. The Montana Court noted that the *Bowers* case and the other cited U. S. Supreme Court cases had all been decided before the 1959 amendment, wherein Congress declared:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or *indirectly*, in the computation of the tax. . . . (Emphasis added.)

The Montana Court seemed to focus upon the word "indirectly" as embodying the substance of Congress' extension of the law. At page 912, the Court concluded:

> The language of the 1959 amendment is clear, unambiguous, direct and certain. The plain language provides an exemption to every form of state taxation that requires United States obligations or interest to be considered directly or *indirectly* in the computation of the tax. The statute speaks for itself. (Emphasis added.)

And again on page 913, the Court concluded:

> Thus, it appears to us that Congress intended to prohibit state inroads on the federal exemption statute by enacting an all-inclusive prohibition against any form of state taxation that requires United States obligations to be considered, directly or *indirectly*, in computing the state tax. (Emphasis added.)

The Petitioner-Banks in the instant case are arguing that any ad valorem tax levied against bank shares, even if imposed on the shareholders rather than the banks

themselves, would be in violation of the 1959 amendment if no deduction is allowed for federal obligations. Such a tax, the Petitioners assert, would require that federal obligations be considered *indirectly* "in the computation of the tax."

But what if the Montana Court was incorrect in its belief that the idea of "indirect taxation" constituted a departure from or extension of the existing law? What if the 1959 amendment merely clarified the existing law? And what if the *Bowers* opinion represents a correct exposition of the law both before and after the 1959 amendment? Then the reasoning of the Montana Court was completely in error.

This Court began the *Bowers* opinion with a concise history of the rule of immunity for federal obligations from state taxation. The rule was derived from the "Borrowing" and "Supremacy" Clauses of the Constitution and from the landmark case of *M'Culloch v. Maryland, supra.*

> It [the rule] was subsequently embodied in a succession of federal statutes, the existing statute being R.S. § 3701, 31 U.S.C. § 742, 31 U.S.C.A. § 742. The rule has been carried forward to embrace *indirect* taxation of such obligations through their inclusion in a tax imposed on all the property of a taxpayer. 75 S.Ct. at 608. (Emphasis added.)

The prohibition against "indirect taxation" of federal obligations was therefore a part of "the rule" in 1955. The Montana Court's basic assumption, consequently, was plainly and simply—wrong.

D. THE GLOSS ON THE RULE OF IMMUNITY

If it may be concluded then, that the *Bowers* opinion presents an accurate picture of the state of the law both before and after the 1959 amendment, the question logically follows: What was the position of this Court in *Bowers* regarding the taxation of bank stock? At page 609, this Court described the "gloss on the rule of immunity":

> It has been held that a state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation. This doctrine had its origin in cases involving national bank stock. There, congressional consent to state taxation of the stock of national banks, upon certain conditions, was held, over strong dissent, to permit such taxes to be assessed without the exclusion of federal obligations owned by the banks. Van Allen v. Assessors, 1846, 3 Wall. 573, 18 L.Ed. 229; National Bank v. Commonwealth of Kentucky, 1870, 9 Wall. 353, 19 L.Ed. 701; Des Moines National Bank v. Fairweather, 1923, 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191. This result was reached in part on the theory that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets, so that a tax on the stockholders' interests is not a tax on the federal obligations which are included in the corporate property. This rationale has been carried over to cases involving stock of state-created banks, and thus a tax on their shareholders, though measured by corporate assets which include federal obligations, is held not to offend the rule immunizing such obligations from state taxation. Cleveland Trust Co. v. Lander, 1902, 184 U.S. 111, 22 S.Ct. 394, 46 L.Ed. 456. Further, in levying a

tax on shareholders, a state may require its payment by the corporation, as a collecting agent. Corry v. Baltimore, 1905, 196 U.S. 466, 25 S.Ct. 297, 49 L.Ed. 556. The result is that when, as is usually the case, the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations is concerned. Nevertheless, this exception to the general rule of immunity is firmly embedded in the law.

II.

STATE TAXATION UNDER 31 U.S.C. § 742

The extent to which financial obligations of the Federal Government may be taxed is governed by congressional legislation. This Court has held that the states may tax bank shares where the assessment is made against the shareholder as owner of the shares, even though the amount of the tax was based upon the bank's total assets including statutorily tax-exempt United States securities. *Van Allen v. The Assessors,* 70 U.S. 573 (1866). This doctrine is based upon the distinction between the bank's tax exempt corporate assets and the equity shares of the corporation owned by the individual shareholders. *Des Moines National Bank v. Fairweather,* 263 U.S. 103 (1923).

Petitioners contend that the 1959 amendment to 13 U.S.C. § 742 nullifies this doctrine. Petitioners would also argue that § 742 repeals by implication any authority to tax bank shares granted under 12 U.S.C. § 548 because the effect of deducting federal obligations results in a negative value on the majority of bank shares. However,

your Amicus submits that this is not the correct interpretation of § 742 and § 548 and that both statutes can be read together to provide a clear grant of authority to the states to tax bank shares, even though the value of such shares may be based, in part, upon the value of government obligations owned by the banks.

Section 742 prohibits the taxation of banks where federal securities or obligations are considered, directly or indirectly, in computing the assessment against the banks. Section 548 authorizes a state to tax all shares of national banking associations located within its jurisdictions the same as state banks organized and existing under the laws of the state. Petitioners argue that the statutes grant the authority to tax bank shares without excluding the value of federal obligations in one instance and prohibit the tax in another. However, both statutes may be reconciled. It is not inconsistent that § 742 requires that federal obligations be deducted when assessing taxes on banks, while § 548 does not require such a deduction. Each statute has a distinct and independent purpose. One clarifies the other. Section 742 addresses the taxation of banks and § 548 addresses the taxation of bank shares.

Section 742, as amended in 1959, attempted to clarify the state's authority set out under § 548. The introductory statement, "except as otherwise provided by law," clearly establishes the focus of the statute. It dictates that the following provisions are not the sole and ultimate determinant of the state's authority to tax. This statement was present before and after the 1959 amendment. Since the amendment did not change the emphasis of this statement and merely added that the immunity against state taxation of federal obligations extended to direct and indirect taxation, the "express exception obviates any difficulty that

might otherwise exist in reconciling the two provisions." *Bank of Texas v. Childs,* 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

When analyzed in this regard, it becomes apparent that the two statutes operate as a unit. Section 548 sets out the State's authority to tax, whereas § 742 establishes the outer limits of that power. Section 548 authorizes a tax on bank shares. Section 742 prohibits a tax on banks. A tax on bank shares is a tax upon the shareholder, not the bank. The shareholder is a private citizen investing in bank shares and not in federal notes and bonds. The shareholder is not an investor in federal obligations merely because the bank in which he has invested owns such obligations.

In *Van Allen v. The Assessors, supra,* this Court stated:

> The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital. . . . This is a distinct independent interest in property held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states. . . . 70 U.S. at 584.

It is the distinction between the individuality of the bank as an entity and that of its shareholders which allow the two principles contained in 31 U.S.C. § 742 and 12 U.S.C. § 548 to be reconciled. *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902). In *Bank of California v. Richardson,* 248 U.S. 476, 483 (1919) this Court said:

> . . . Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the

> states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation . . .
>
> The just aim was attained by the non-recognition of any power whatever in the States to tax federal agencies, the banks, except as to real estate specifically provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore reached by taxation of the stockholders as such . . .

[See *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, (1968).]

The present language in both § 742 and § 548 has not changed the application of prior case law as set out above. The effect of a bank share tax which considers federal obligations in its computations has been recognized by this Court in decisions prior to the amendments. Clearly, they still apply.

This Court has determined that § 548 dictates that national banks and their property should be free from taxation under state authority, except as otherwise provided by law. Taxes levied on all shares in such banks may be assessed against their owners, the stockholders,

the same as other personal property. *Des Moines National Bank v. Fairweather, supra.*

The Court in *Cleveland Trust Co. v. Lander, supra,* found that the share tax did not conflict with the exemption of federal obligations. Similarly, the Court in *Society For Savings v. Bowers, supra,* recognized the general rule permitting the taxation of bank shares without the exclusion of federal obligations owned by the banks.

In *M'Culloch v. Maryland, supra,* the Court's decision prohibiting state taxation of national banks was premised on the fact that the bank taxed was a national bank and was singled out as such. Section 548 was conceived upon this notion. The restrictions contained therein are designed to prohibit discriminatory tax practices directed against national banking associations or their shareholders as a class. *Tradesman's National Bank v. Oklahoma Tax Commission,* 309 U.S. 560 (1940). The statutes as amended resolved that problem.

If Petitioner's interpretation is accepted, a class of taxpayers would be granted immunity from state taxation and local governments would be required to shift the economic burden of taxation to other property owners. Clearly, this is not what Congress intended.

CONCLUSION

Liability for the bank share tax under Texas law rests on the shareholder. It attaches to the shareholder's interest. The bank is not liable for the tax. *Brown v. First National Bank of Corsicana,* 175 S.W. 1122 (Tex. Civ. App., Dallas—1915, writ ref'd). There is no requirement that the banks pay the tax. The bank bears no liability upon

default. Other than the obligation to provide assessing information to local taxing authorities, banks in Texas are under no duty whatsoever to pay taxes on their bank shares. Therefore, assessments made on bank shares in Texas violate no federal law and comply fully with § 742 and § 548.

For the reasons stated herein, your Amicus respectfully submits that the statutory scheme for the taxation of bank shares in the State of Texas is in full compliance with the applicable federal statutes and the precedents set down by this Court.

Respectfully submitted,

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District Of Texas At Dallas

BRIEF OF NUECES COUNTY TEXAS AND CITY OF CORPUS CHRISTI TEXAS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Petitioners' Application for Writ of Certiorari was granted limited to Question 1 presented by the Petition. Respondents rephrased that Question Presented and more accurately and clearly stated the Question. Nueces County Taxing Authorities submit that the Question Presented is:

Whether 31 U.S.C. § 742 requires that the United States Obligations owned by a banking corporation be deducted from the cash value of an individual shareholder's shares in the banking corporation in order for a State Ad Valorem Tax on the individual shareholder's stock to be valid.

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IN THE

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No. 81-1717

AMERICAN BANK AND TRUST COMPANY, *et al.*,
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DALLAS COUNTY, *et al.*,
Respondents.

On Certiorari To The Court Of Appeals For The Fifth Supreme Judicial District Of Texas At Dallas

---

BRIEF OF NUECES COUNTY TEXAS AND CITY OF CORPUS CHRISTI TEXAS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

I.
STATEMENT OF INTEREST

Pursuant to Rule 36, Paragraph 4, Rule of the United States Supreme Court, Nueces County, Texas (which also collects ad valorem taxes for State of Texas, Nueces County Farm to Market Roads, and Nueces County Hospital District), and City of Corpus Christi, (which also collects ad valorem taxes for the Corpus Christi In-

dependent School District, and Corpus Christi Junior College District), hereafter referred to as Nueces County Tax Authorities, as political subdivisions of the State of Texas sponsored by their duly authorized law officers, submit this their Brief in support of Respondents. The Nueces County Tax Authorities assess and collect ad valorem taxes in the same manner as the Respondents, Dallas County, et al. A substantial part of the local tax revenue received by these Nueces County Tax Authorities is derived from the ad valorem tax on shares of bank stock and thus the Nueces County Tax Authorities' interest is identical with that of the Dallas County Tax Authorities.

II.
LOCAL INTEREST

The Nueces County Taxing Authorities assessment of ad valorem taxes on shares of bank stock is currently under challenge in lawsuits styled, *American National Bank, et al* v. *City of Corpus Christi, et al.*, Cause No. 82-475-F pending in the 214th Judicial District Court, Nueces County, Texas and *Hondo National Bank* v. *Magee, et al.*, Cause No. 81-3417-G and 82-1039-G, in the 319th Judicial District Court, Nueces County, Texas. The taxes assessed for the years 1981 and 1982 which the Nueces County Taxing Authorities are attempting to collect in the above suits are currently on deposit in the Registry of the Court in an interest bearing account. The total sum deprived these local governments as of this writing is $1,956,652.26 with several other accounts outstanding. That amount of money represents the potential actual tax revenue loss to these Nueces County Taxing Authorities if this Court should hold against Respondents. The Nueces County Taxing Authorities have

assessed ad valorem taxes against shares of bank stock at least since 1905. In fact, the records of the Tax Office contain renditions of bank stock for taxation by the largest bank in the County as early as 1951 and several subsequent years including 1958, 1959 and 1961. It has been reported that all federally insured banks hold an average of eleven percent of their investments in federal obligations. *Board of Governors of the Fed. Res. System, Annual Statistical Digest,* Table 7-3 (1974-78); the total assessed valuation of the various bank stock accounts for the tax year 1982 by the Nueces County Taxing Authorities totals $92,646,137. Even with the inclusion of the tax revenue based on shares of bank stock, the County of Nueces and the Corpus Christi Independent School District report a shortfall in their revenue. In other words, there will not be sufficient money to support the budgets adopted by the duly elected representatives of the people.

The Texas Association of Appraisal Districts reports the relief sought by Petitioners would adversely affect the stability of the local property tax base in Texas. The Legislative Budget Board of the Texas Legislature has projected that unsuccessful state legislation to accomplish the same objective would have had the following fiscal implications.[1]

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[1] Texas Legislative Budget Board, Fiscal Note to House Bill No. 955, 67th Leg., Reg. Sess. (1981). In the 1981 Texas Legislature, the Banks had H.B. 955 introduced to repeal the ad valorem tax on bank stock, but replaced it with a franchise tax to which Banks are not now subject. Nueces County Tax Authorities contend that the Texas Legislature and U.S. Congress are the proper forum for resolving the issue Petitioners bring to this Court.

Fiscal Year	Revenue Loss to Local Governments
1982	$ 99,000,000
1983	108,900,000
1984	119,800,000
1985	131,700,000
1986	144,900,000

In addition to the suits cited above directly involving the Nueces County Taxing Authorities presenting a similar question of law involved in this case, the Attorney General of Texas has reported there are approximately *forty* similar lawsuits pending in the various Texas State District Courts. Therefore, the issue is of vital importance to the Nueces County Taxing Authorities as well as taxing authorities of the entire State of Texas. Petitioners state at page 10, Petition for Writ of Certiorari, that on December 31, 1980, Texas banks hold 7.2 billion dollars of United States Treasury obligations. That amount represents the value of personal property liable under state law for ad valorem taxation and represents a significant source of local tax revenue. That figure can be contrasted to the figure reported by the *Texas Almanac* for December 31, 1959. (A significant date in terms of the legislative history relied upon by Petitioners) of $2,852,101,988.00 which difference clearly shows that *the assessment of ad valorem taxes against bank shares over the years has not impeded the purchase of federal obligations by Texas banks.* In fact, such banks continue to purchase such obligations in greater amounts even in face of the tax.

III.
SUMMARY OF ARGUMENT

Petitioners are asking the Court to do what they have been unsuccessful in accomplishing in the Texas Legislature (in House Bill 955, 67th Leg., Reg. Sess., 1981, which failed) and in the U.S. Congress in the 1959 Amendment to 31 U.S.C. 742. The position urged by Petitioners will result in a substantial alteration of the Federal-State relationship and such alteration is for Congress not for this Court.

For Petitioners to prevail, the Court must ignore or hold that 12 U.S.C. 548, as it existed in 1959, is repealed by implication. Such a holding is not authorized by the Legislative history of the 1959 amendment to 31 U.S.C. 742. Petitioners are actually asking this Court to exempt them from ad valorem taxation after they were unsuccessful in achieving that result in the Texas Legislature or the U.S. Congress. This Court can assume that the Texas taxing authorities factored in the Federal Obligations into their assessment of Bank Stock since universally such stock is assessed at less than market value.

There is no conflict with the Texas decision in this case and the Montana decision since the Montana tax is on the Bank and the Texas tax is on the shareholders.

IV.
SUBSTANTIAL ALTERATION OF FEDERAL-STATE RELATIONSHIP IS FOR CONGRESS, NOT COURT

In this case the Taxing Authorities seek to maintain the *status quo*. The bank shareholders ask the Court to overturn over 115 years of settled law. For such a new right, they must show clear authority. However, the shareholders are attempting, without a shred of legislative

authority, to work a major revision in federal-state relations. They are asking this Court, since neither Congress nor the Texas Legislature voted for them, to act as a legislature to create new law. The shareholders claim that a tax, which all agree was valid prior to 1959, became invalid thereafter even though such a result was not considered, addressed, intended or approved by Congress or the Treasury. The record is devoid of evidence to support the shareholders' attempt to have the Court make law, and their invitation should be declined.

As the Solicitor General argues, Brief at 8-9, 16, 20, these Statutes are "not unambiguous" and there is no indication Congress intended to overturn the settled law. The Texas Appeals Court well noted, at 824 and passim, that the language must be considered with the history.

The intent of Congress in the 1969 Amendment was to expand, and not restrict, the taxing authority of the States. *Bank of Texas* v. *Childs*, at 824. *State and Local Taxation of Banks*, at 9, 24. In accord, Senator Proxmire noted in the Senate debate that "the committee [on Banking, Housing and Urban Affairs] is in full accordance with the principle that every state should be allowed the greatest degree of autonomy with regard to the formulation of its tax structure." 115 Cong. Rec. 35399 (Nov. 21, 1969). 1969 U.S. Code Cong. and Ad. News 1597.

The Senate Banking and Currency Committee Report further stipulated:

> "The Committee wants it clearly understood that the prohibition . . . is not a prohibition against the continued imposition of any tax under the authority of Section 5219 as it now reads." S. Rep. No. 91-530,

91st Cong. 1st Sen., reprinted in (1969) U.S. Code Cong. and Ad. News 1596.[2]

As the Texas Court's analysis at 824ff makes clear, *Congress* in a temporary amendment in 1969 *expressly "continued the authority to levy the taxes previously authorized, including bankshare taxes."* "This continuation would have been pointless if the effectiveness of bank share taxes had been nullified by the 1959 amendment. . . ."

The entire history of the amendment and Federal Reserve Report confirm that expansion and not limitation of the State's taxing power was intended, and that there was no intent to cut-off States' ability to tax bank shares.

The bank shareholders now ask this Court to do what the legislature did not do or intend[3] and, in so doing, to reverse both the clear intent of Congress and over 115 years of settled interpretation and practice. Absent explicit authorization, the Court should not usurp the role of Congress to make a substantial alteration in state-federal relations.

As the record shows, were the Court to now change the law and settled practice of over 115 years, State and local

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[2] "It has never been questioned in this Court that Committee Reports, as well as Statements by those in Charge of a bill or of a report, are authoritative elucidations of the scope of a measure." Justice Frankfurter, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 399-400 (1951).

[3] "A thing may be within the letter of a Statute and not within its meaning, and within its meaning though not within in its letter. The intention of the lawmaker is the law." *Hawaii* v. *Mankichi*, 190 U.S. 197, 212 (1903) Cf *Weber* v. *United Steel Workers of America*, 443 U.S. 193 (1980).

governments would lose large amounts of tax revenue which they have traditionally received and currently planned on. Nueces County Tax Authorities alone will lose over $1,000,000 annually, a loss which would be a severe burden for a county, not unlike many others, already in imminent fear of deficit because of budget shortfalls. Such a major injury surely cannot be allowed to be inflicted without express Congressional intent and in view of the historical fact that Texas Banks continue to purchase Federal obligations despite such taxation.

The reversal of decades of practice, long sanctioned by Congress and the Court, is for Congress and not for the Court. If Congress truly intends to prohibit this tax, let it be given opportunity. This is time for the "passive virtues," for the Court to "remand"[4] the issue to Congress by refusing to undertake the task clamored for by the shareholders.

Congress has not delegated to the Court, either expressly or in the legislative history, any power to make a substantial alteration never envisioned by Congress. Without a clear statement of such intent, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the matter should be left to Congress.[5]

V.
REPEALS BY IMPLICATION ARE NOT FAVORED

It is clear that prior to the 1959 Amendment to 31 U.S.C. § 742 that the ad valorem tax under challenge

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[4] A. Bickel, The Least Dangerous Branch. 165, 66 (1982).

[5] Cf. "Intent, clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court." 95 *Harvard Law Review* 892 (Feb. 1982).

here would have been upheld. *Van Allen* v. *The Assessors*, 70 U.S. (3 Wall) 573 (1866); *Cleveland Trust* v. *Lander*, 184 U.S. 111 (1902), and Petitioners agree in their Petition for Writ of Certiorari at page 8. Petitioners argue that the 1959 Amendment to the cited Statute requires a deduction for United States obligations in computing the State share tax by prohibiting taxes which consider those obligations directly or indirectly in the computation of a local tax. Petitioners contend the 1959 Amendment extended the exemption to prohibit exactly what they concede had been permitted under the former language. That argument is *only valid if 12 U.S.C. § 548 is ignored or is repealed by implication by the 1959 Amendment.* In 12 U.S.C. § 548, Congress expressly consented to the local taxation of national bank shares without requiring the exclusion of federal obligations. 31 U.S.C. § 742 is a general exemption statute and, as such, the 1959 Amendment to it cannot control or repeal a specific consent to local taxation found in 12 U.S.C. § 548. When Congress acted in 1959, had it intended to restrict or limit the rights of taxation, it would have done so in a specific provision of the National Bank Act, specifically 12 U.S.C. § 548.

Neither the explicit language of the 1959 Amendment to 31 U.S.C. § 742 nor the legislative intent support the interpretation sought by the bank petitioners herein. "Exemption from Taxation does not rest upon implication." *U.S. Trust Co.* v. *Helvering*, 307 U.S. 57 60 (1939). "It must be remembered that statutory exemptions for tax purposes are a matter of legislative grace, and must be strictly construed." *Lutkins* v. *United States*, 312 F.2d 803, 805 (Ct. Cl.) cert denied, 375 U.S. 825 (1963). See also *Texas* v. *Moody's Estate*, 156 F.2d 698, 700 (5th Cir. 1946); *Conference of Major Religious Superiors* v. *District of Columbia*, 348 F.2d 783, 785 (D.C. Cir. 1965).

It is clear from the legislative history cited by Respondents that Congress did not intend a repeal by implication. It is clear from the testimony of the Honorable Robert B. Anderson, Secretary of the Treasury, cited in Respondents' Reply to Brief for United States as Amicus Curiae, pages 3 through 5, that the 1959 Amendment to 31 U.S.C. § 742 was a specific response solely to prohibit the State of Idaho from taxing the income from such securities. The lower Texas Court, *Bank of Texas, et al* v. *John Childs, et al.*, 615 S.W.2d 810, at 817, points out that the *Van Allen* decision has been repeatedly reaffirmed and recorded as settled law by the Supreme Court. As noted above, all federally insured banks hold an average of eleven percent of their investments in federal obligations. Banks in Texas, on December 31, 1980 held $7,288,535,000.00 worth of U.S. obligations. Excluding the value of those federal obligations in the ad valorem tax computation would result in a significant loss of tax revenue to the local governments. If Congress had intended to deny such revenue to the local governments, then Congress would have clearly stated its objective in the legislative Amendment and that legislative history would point to the *Van Allen* decision as being repealed. It should be noted that in 1969 Congress *broadened* the provisions of 12 U.S.C. § 548 which expressly consents to the local taxation of national bank shares. But the Act of December 24, 1969 PUB. L. No. 91-156 Sec. 4, 83 Stat. 435, delayed final application of the revised statute for two years. During that time, the Federal Reserve Board was directed by Congress to make a study of the probable economic impact on the banking economy by the permanent revision. That report does not mention anywhere the economic impact on banks of any repeal of the state's power to consider directly or indirectly federal obligations in computing the banks' share tax. *Senate Commit-*

tee on Banking, Housing and Urban Affairs; State and Local Taxation of Banks, 92nd Cong., First Sess., U.S. Senate parts I, II, III, IV, Study Under Public Law 91-156, 92-213. Surely if the exclusion of federal obligations as argued by Petitioners was intended by Congress, it would have been mentioned in the legislative history and in this significant report.

Petitioners allege that all they are asking this Court to do is require the taxation authorities to compute the bank shares tax by deducting the tax exempt United States obligations from the assessment pursuant to 31 U.S.C. § 742. In fact, they are not seeking an exemption from taxation of those Federal obligations, but rather a flat exemption of bank stock from ad valorem taxation in those states which authorize such an assessment.[6] The clear evidence in this case shows that the actual assessment was less than the fair market value of the bank shares. (Statement of Facts, Pages 193-194.) If Petitioners' argument is taken at face value and all federal obligations held by the bank were deducted from the value of the net assets, then "nothing would remain to be divided proportionately among the shareholders." *Bank of Texas* v. *Childs*, 615 S.W.2d, 810, 816 (Tex. Civ. App.—Dallas 1981 Writ ref'd n.r.e.). That is the logical result of Petitioners' argument, but certainly not a result they would publicize in their Annual Reports.

Such a position would place 31 U.S.C. § 742 in direct conflict with 12 U.S.C. § 548. This Court should strive to harmonize these separate provisions of Congress, and, in

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[6] *Bank of Texas* v. *Childs*, at 824, 25, citing the Federal Reserve Board Report prepared for the U.S. Senate under the Command of Public Law 91-156.

fact rejected an identical argument involving earlier versions of both statutes, and found "no want of harmony." *Cleveland Trust* v. *Lander*, 184 U.S. 111, 115 (1902) Indeed, *Van Allen* itself is such a harmonization of Sec. 2 of the Act of February 25, 1862 and Sec. 41 of the National Bank Act, based upon the distinction between the *bank* and its *shareholders*.

Petitioners' whole argument is based on the assumption that the Texas Taxing authorities do not consider or deduct the Federal Obligations from the assessment of Bank Stock, and the record in this case supports that assumption. But this Court can just as easily assume as a matter of law that the taxing authorities do factor such Federal Obligations out of the assessment since as matter of fact the Bank Stock in this case is assessed at less than full market value (S.F. 193-194) and universally in Texas such stock is assessed at less than full market value. If Petitioners prevail, Banks will then be treated differently from other corporations in that they will pay no franchise or ad valorem tax in Texas, i.e. Petitioners' position would require Texas impose a discriminatory tax.

Petitioners incorrectly assert that only one method of arriving at the value of bank stock may be utilized under Texas law: the "book value" method. Under the book value method, the aggregate value of a bank's shares is determined by summing the amounts shown on the bank's financial statement of capital, surplus, undivided profits, and certain reserves. The value of the bank's real property is then deducted from the total to prevent its double taxation. The remainder represents the total value of all the bank's shares. The bank would then be taxed on the value of its real property and the shareholders on the value of their shares.

Neither Article 7166 nor its successor statutes dictate a particular method or computation to be used in appraising bank stock. The Texas statutes require only that the market value of the real property owned by the bank be subtracted from the actual cash value of the bank's stock. "There is no exclusive method for determining the fair cash value of bank stock." TEX. ATT'Y. GEN. OP. NO. WW-1208 (1961).

Petitioners, then, would ignore the "market" method of assessing bank stock in order to distort book value calculations. Under the more accurate market method, the value of bank stock is determined by identifying the recent selling price of such shares in the open market. This price is multiplied by the number of shares outstanding to arrive at a total value of the bank's stock. Again, the value of the bank's real property is subtracted from this total. The remainder represents the total taxable value of the bank's shares, which is divided proportionately among the shareholders.

The market method is professionally accepted as the preferred method of appraisal. The book value method is used only as a guide in arriving at market value, and then only if market information in unavailable. The tax assessor must adjust the book value upward or downward if he has knowledge that it does not reflect true market value. Indeed, the market value of bank stock usually exceeds its book value and that is true in this case. (S.F. 193-194) See also *Texas State Property Tax Board, General Appraisal Manual* Art. 12, Appraisal of Financial Institutions, at FI-6 to FI-8 (1980).

By its own terms, 31 U.S.C. § 742 is inapplicable both to Article 7166 and to the accepted practices of assessing bank stock under Texas law. The exemption of federal obligations extends only to those "forms of taxation that

would *require* that . . . the obligations . . . be *considered* . . . in the *computation* of the tax . . ." (emphasis added). Whether the tax is computed using the market method or the book value method, consideration of federal obligations is neither required nor optional, but is instead irrelevant. Hence, "the plain language of the statute, its origin, and its purpose"[7] permit Texas' present form of taxation of bank stock.

VI.
THERE IS NOT CONFLICT BETWEEN THE STATES

Petitioners claim that the decision of the Supreme Court of Texas,[8] Georgia[9] and Montana[10] are in conflict. An examination of the Montana statute demonstrates a fundamental difference in its tax scheme which distinguishes the Montana holding.

Montana levied a tax directly against the bank upon its assets. The banking corporation itself was liable to the state for the tax assessment. The shareholders themselves incurred no tax liability but only a duty to reimburse the bank upon request. The Montana statute so provided. Mont. Rev. Codes Ann. 584-4605 (1947.)

The Montana tax was plainly not a tax upon the shareholder's property interest in his stock, but upon the *bank's property* interest in its assets.

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[7] *Nat'l. Muffler Dealers Assn.* v. *United States*, 440 U.S. 472, 477, (1979).

[8] *Bank of Texas, supra.*

[9] *Bartow County Bank* v. *Bartow County Board of Assessors*, 248 Ga. 703, 285 S.E. 2d 920 (1982), appeal docketed, No. 81-1834 (April 5, 1982).

[10] *Montana Bankers Ass'n.* v. *Montana Dept. of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978) (3-2 decision).

The Texas statute at issue places upon *the shareholder* the liability for taxes assessed against his bank stock. In actual practice, Texas banks pay the tax for their shareholders and then receive a deduction of their Federal Income Tax. The bank bears no liability for these taxes, and is liable only for the taxes against the real property which it owns. Art. 7166. (Brief of American Bankers Association, Page 3.) The Texas Courts have enforced this distinction, holding an assessment against a bank by a city upon the stock of the bank as *unauthorized. City of Marshall* v. *State Bank of Marshall*, 127 S.W. 1083 (Tex. Civ. App. 1910, Writ ref'd).

The audacity of the Bank Petitioners is truly amazing. The bank stock in this case is assessed at less than its fair market value. They pay no franchise or other state tax, they pay their share holders tax, receive credit on their Federal Income Tax, and still complain of the assessment! Montana, therefore, employed a different tax plan from that authorized by Texas law. Respondents point out this distinction in revising the question presented to the Court. The *Van Allen* line of decisions has no application to the Montana tax, since that tax does not recognize the shareholder-corporation distinction. The Georgia statute, like the Texas law, correctly assessed the tax upon the bank's *shareholders* rather than the bank itself, and the Georgia decision specifically follows the Texas holding in *Bank of Texas, Supra:* Ga. Code Ann. § 91A-3301 (1980); *Bartow County Bank, Supra.*

VII.
CONCLUSION

For the reasons stated herein, your Amici respectfully urge this Court to reject the contention of Petitioners and

uphold the ad valorem taxation on bank shares as utilized by taxing authorities in the State of Texas.

Respectfully submitted,

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Amicus Brief

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, *et al.*,
Petitioners,

v.

DALLAS COUNTY, *et al.*,
Respondents.

On Writ Of Certiorari
To The Court Of Appeals For The
Fifth Supreme Judicial District of Texas In Dallas

MOTION OF THE TEXAS ASSOCIATION OF APPRAISAL DISTRICTS, THE TEXAS ASSOCIATION OF SCHOOL BOARDS, THE TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, THE TEXAS COUNCIL OF SCHOOL ATTORNEYS, AND THE TEXAS MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Texas Association of Appraisal Districts, the Texas Association of School Boards, the Texas Association of School Administrators, the Texas Council of School Attorneys, and the Texas Municipal League hereby respectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached Brief as Amici Curiae in Support of Respondents. The consent of counsel for the Respondents has been obtained, and Respondents are filing their written consents directly with the Office of the Clerk. The consent of counsel for the Petitioners was requested but refused.

Each of the statewide organizations joining in this brief represents political subdivisions of the State of

Texas which would be adversely affected by the outcome sought by Petitioners. It is believed that the Brief which Amici Curiae request permission to file will more completely present the issue of Congressional intent than has been argued by the parties.

QUESTION PRESENTED

Whether a state property tax on bank shares computed on a bank's net assets without any deduction for tax-exempt United States obligations owned by the bank violates 31 U.S.C. §742?

STATEMENT OF INTEREST

Under present Texas law,[1] the authority to value property for ad valorem tax purposes is vested in each county-wide appraisal district. Through the process of appraising and equalizing property values, the appraisal district establishes the property tax base for all local governments within the county.

The Texas Association of Appraisal Districts is a statewide organization whose purpose is to promote effective and efficient property tax administration in Texas. One hundred and twenty-six appraisal districts are members of the Texas Association of Appraisal Districts.

The Texas Association of School Boards represents over 1,000 school boards from throughout the State of Texas. Its member schools educate 99% of the total elementary and secondary student population. School districts in Texas must rely heavily on property taxation as a source of revenue.

The Texas Association of School Administrators represents over 1,000 school district superintendents from across the State of Texas.

The Texas Council of School Attorneys is comprised of

1. TEX. PROP. TAX CODE (Vernon 1982) (Effective January 1, 1982).

over 150 practicing attorneys who represent school districts in Texas.

The Texas Municipal League is an association of some 830 incorporated municipal governments of Texas. Property tax revenues provide a vital source of income to the cities and towns of Texas.

The relief sought by Petitioners would adversely affect the stability of the local property tax base in Texas. The Legislative Budget Board of the Texas Legislature has projected that unsuccessful state legislation to accomplish the same objective would have had the following fiscal implications:[2]

Fiscal Year	Revenue Loss to Local Governments
1982	$ 99,000,000
1983	108,900,000
1984	119,800,000
1985	131,700,000
1986	144,900,000

Similar losses to the local governments of Texas are anticipated in the event that Petitioners should prevail.

WHEREFORE, it is respectfully requested that the Court grant the Texas Association of Appraisal Districts, The Texas Association of School Boards, the Texas Association of School Administrators, the Texas Council of School Attorneys and the Texas Municipal League leave to file the attached brief as amici curiae in support of Respondents.

Respectfully submitted,

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2. Texas Legislative Budget Board, Fiscal Note to House Bill No. 955, 67th Leg., Reg. Sess. (1981).

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January 14, 1983

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Petitioners,

vs.

DALLAS COUNTY, *et al.*,
Respondents.

ON CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF OF TEXAS ASSOCIATION OF APPRAISAL DISTRICTS, TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, TEXAS COUNCIL SCHOOL ATTORNEYS AND TEXAS MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

It is a well-settled rule that the states may tax the interest of a shareholder in his stock without deducting from the value of that stock any United States obligations held by the corporation. For over a century, both the decisions of this Court and the acts of Congress have permitted this form of taxation. 31 U.S.C. §742 prohibits the taxation of a bank where its federal securities are considered in the computation of the assessment against the bank.

However, this statute has no application to the separate taxation of a shareholder on the value of his bank stock. At no time did Congress consider the reversal of this doctrine to be a legislative objective. Moreover, the statutory interpretation urged by Petitioners would necessarily exempt certain taxpayers from other forms of state and local taxation, a result clearly unforeseen and unintended by Congress. Petitioners merely seek to accomplish in this Court an end which they could not achieve through Congress or through the Texas Legislature, as well as the courts below.

ARGUMENT

FEDERAL LAW CLEARLY SUPPORTS THE DECISIONS OF THE TEXAS COURTS.

A. The court has historically approved the full taxation of a shareholder's interest in his stock, without exemption for federal obligations held by the corporation.

TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960) (repealed January 1, 1982) imposed a tax upon the shareholders of state and national banks doing business in Texas. Each share was appraised for taxation by subtracting the proportionate value of the bank's real estate from the market value of its stock. This method of assessment prevented double taxation of the real property, as taxes on the real property were separate assessed directly to the banking corporation. No deduction of the value of federal obligations was authorized. While each shareholder remained liable for the taxes due on this stock, as a matter of custom the banks would often pay these taxes for their shareholders.[1]

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1. Both this method of appraisal and the bank's option to serve as collecting agent for its shareholders have been codified as §§23.11 and 25.14, respectively, of TEX. PROP. TAX CODE ANN. (Vernon 1982) (effective January 1, 1982).

Since 1866 this Court has upheld the authority of the states to tax the stockholders' interests in a corporation, based on corporate assets, without deducting the value of any United States securities held by the corporation. In *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 593 (1866), the issue faced by this Court was whether the states could impose a tax upon the shares of the national banks held by the shareholders, where the bank capital was invested entirely in United States obligations. In upholding this form of taxation, the Court distinguished the taxable property interest of the shareholder in his shares from a tax upon the assets owned by the corporation:

> The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his portion of the property that may remain of the corporation after the payment of its debt. This is a distinct independent interest or property held, by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen on referring to it. *Id.* at 584.

See also *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353 (1870); *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923).

This distinction has also been applied to cases involving a tax on the shareholders of state banks. The Court has permitted the value of state bank stock to be measured by corporate assets which include federal obligations. *Cleveland Trust Co. v. Lander*, 184 U.S. 111 (1902).

Nor does a requirement that the bank pay such a tax as agent for its shareholders offend the general rule that federal obligations are immune from state taxation. *Corry v. Baltimore*, 196 U.S. 466 (1905).

Even where the practical impact of a shareholder tax upon corporate-owned federal obligations is indistinguishable from that of a tax imposed upon the corporation itself, "this exception to the general rule of immunity is firmly embedded in the law." *Society for Savings v. Bowers*, 349 U.S. 143, 148 (1955) (Harlan, J.).

B. Neither the wording of the 1959 amendment to 31 U.S.C. §742 nor its legislative history would extend the exemption of federal obligations to the taxable interest of the bank stockholders.

Petitioners erroneously contend that the 1959 amendment to 31 U.S.C. §742 (Rev. Stat. 3701) reversed almost a century of well-settled case law following the reasoning of *Van Allen, supra.* The 1959 amendment states:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate or inheritance taxes (31 U.S.C. §742).

The effect of this amendment, as evidenced by the intent of Congress, was merely to clarify and codify the existing general rule of immunity and not to eliminate any established exception to that rule. The Senate Finance Committee Report on the bill containing this amendment states that the amendment "makes it clear that both the principal and interest on U. S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes." S. REP. NO. 909, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2769. The report further offers the following explanation of the object sought by the amendment:

> D. CLARIFYING EXEMPTION OF U. S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
> Present law provides that obligations of the United

> States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on United States obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one state has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable income is determined. The bill (Sec. 105) makes clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes. *Id.* at 2773.

And in the House floor debate on this legislation, Chairman Mills of the House Ways and Means Committee similarly described the amendment as merely "a reaffirmation of the exemption from certain local taxes on Federal Bonds." 105 CONG. REC. 18157 (1959). Absent entirely from the legislative histories is any intention to prohibit or restrict state taxation of bank shareholders' stock.

Instead, the objective of the 1959 amendment was to overcome a legal fiction utilized in "one state" that attempted to include interest on federal obligations in gross income for purposes of its individual income tax. According to the Secretary of the Treasury, the State of Idaho had argued that its tax was not on exempt income, but " 'upon every individual . . . measured by his net income.' " *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 71 (1959) [hereinafter cited as *House Hearings*]. In his written statement, the Secretary attributed the following purpose to the 1959 amendment:

> In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute

more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general. *Id.* at 72.

Clearly, the addition of the second sentence to 31 U.S.C. §742 had a finite objective inapplicable to the tax in question. The distinction between an individual and his income sought by the State of Idaho has not been recognized historically by this Court. In seeking to resolve this one, isolated controversy, neither the Executive nor the Legislative branches advocated or anticipated a result so far-reaching as that argued by Petitioners. The legislative history of the 1959 amendment is void of any intention to overturn nearly a hundred years of holdings following *Van Allen, supra*, nor to accomplish any purpose other than the resolution of the Idaho income tax issue.

Neither the explicit language of the 1959 amendment nor the legislative intent support the interpretation sought by Petitioners. "Exemption from taxation does not rest upon implication." *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). "It must be remembered that statutory exemptions for tax purposes are a matter of legislative grace, and must be strictly construed." *Lutkins v. United States*, 312 F.2d 803, 805 (Ct. Cl.), cert. denied, 375 U.S. 825 (1963). See also *Texas v. Moody's Estate*, 156 F.2d 698, 700 (5th Cir. 1946); *Conference of Major Religious Superiors v. District of Columbia*, 348 F.2d 783, 785 (D.C. Cir. 1965).

Petitioners claim that the Texas tax on bank stock "indirectly considers" federal obligations in which the bank has

invested, violating Petitioners' broad interpretation of 31 U.S.C. §742 as amended. This reading attributes an exaggerated meaning to the 1959 amendment well beyond the specific purpose sought by Congress. Long before the 86th Congress, the general rule of immunity had been carried forward by this Court to preclude indirect as well as direct taxation of United States obligations through their inclusion in a tax imposed on all the property of a taxpayer. *The MacAllen Complaint v. Massachusetts*, 279 U.S. 620, 629 (1929); *Society for Savings v. Bowers, supra*, 349 U.S. at 144. The reference to indirect taxation in the 1959 amendment merely codifies this well-settled application of the immunity rule. The new significance of this amendment is to clarify that the immunity rule applies to interest as well as principal on Federal obligations, where such interest might otherwise be subject to state income taxation.

It is doubtful that this legislation was even necessary to achieve the goal of defeating Idaho's tax scheme. See *Miller v. Milwaukee*, 272 U.S. 713 (1927); *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U.S. 136 (1927); *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 675-767 (1950). But rather than litigate this issue, the Department of the Treasury and the Department of Justice recommended that "the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations *and the interest on them* from every form of State and local *income taxes*. The proposed provision (the 1959 amendment) would accomplish that purpose." *House Hearings, supra*, at 71 (emphasis added).

Petitioners cannot reconcile the direct conflict which their interpretation of 31 U.S.C. §742 would pose with 12 U.S.C. §548 (REV. STAT. 5219). From 1864 to 1969, 12 U.S.C. §548 specifically permitted the States to fully tax the

interests of shareholders in national bank stock. Petitioners do not explain how, for an entire decade, one federal statute (12 U.S.C. §548) could explicitly allow a tax which another (31 U.S.C. §742) allegedly prohibits. This Court has refuted an identical argument involving earlier versions of both statutes:

> The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§5219) by another (§3701), between which their is no want of harmony. *Cleveland Trust Co. v. Lander, Id.* at 115.

Congress reiterated its intent to permit continued state taxation of bank stock in 1969, when 12 U.S.C. §548 was amended to broaden the authority of the states to impose varied forms of taxation on national banks. On November 21, 1969, Senator Proxmire commented in the Senate debate on the object sought by the amendment:

> The purpose of the bill is to try to give the States an opportunity to tax the banks in those States on an equitable basis.
>
> This is hard to do because the present law, Section 5219 of the Revised Statutes, currently provides a list of taxes which can be imposed on national banks by States or their political subdivisions. The list is explicit and contains a number of detailed and cumbersome exceptions. The courts have repeatedly ruled that the taxes specified in Section 5219 are exclusive; that is, they are the only taxes that can be imposed by a State government on a national bank.
>
> This method of restricting State taxation of national banks had its inception approximately 100 years ago.
>
> Incidentally, the committee is in full accordance with the principle that every State government should be al-

> lowed the greatest possible degree of autonomy with regard to the formulation of its tax structure. Accordingly, the committee agrees in principle with the objective of the bill passed by the House of Representatives." 115 CONG. REC. 35399 (Nov. 21, 1969).

Some three weeks later, Senator Tower reiterated the same intent:

> [T]he necessity for new sources of State revenue and the unpopularity of the presently unwarranted immunities of national banks militate for rapid action to clear national banks for new taxes such as sales taxes, documentary taxes, and motor vehicle taxes. The 1970 provision does this adequately, and hence I support the conference report in that respect. 115 CONG. REC. 38634 (Dec. 12, 1969).

Absent entirely from the Congressional history is any intention to repeal the longstanding authority of the States to levy a tax on bank stock. The Senate Banking and Currency Committee Report stipulates that the 1969 amendment is meant to expand and not restrict the taxing authority of the States:

> The committee is in full accord with the principal that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure.
>
> * * *
>
> The committee wants it clearly understood that the prohibition . . . is not a prohibition against the continued imposition of any tax under the authority of Section 5219 as it now reads. S. REP. NO. 91-530, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 1594, 1595, 1596.

Therefore, 31 U.S.C. §742 and 12 U.S.C. §548 should be read harmoniously as authorizing the States to tax the stock of both state and national banks, without regard to federal obligations held, but requiring the States to treat

state and national banks alike. Petitioners' interpretation would necessitate the implicit repeal of provisions of §548 by the enactment of the 1959 amendment to §742 since the deduction of federal obligations would produce a negative value of bank stock in most instances. Those remaining banks receiving substantial reductions in the value of their stock would be encouraged by their shareholders to purchase additional federal obligations in order to avoid local taxation entirely. As a further consequence, banks would discriminate against state and local government obligations in their investments, in order to maintain a portfolio that would effectively exempt their shareholders' stock from taxation. Such a policy would clearly run contrary to the policy of Congress to authorize more flexibility in local taxation while continuing all previously authorized forms of taxation.

Petitioners actually seek not an exemption of federal obligations, but a de facto exemption of the bank stock itself. Evidence presented in the lower courts demonstrates that if all federal obligations held by the bank were deducted from the value of the net assets, as Petitioners advocate, "nothing would remain to be divided proportionately among the shareholders." *Bank of Texas v. Childs*, 615 S.W.2d 810, 816 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Again, such a reading would place 31 U.S.C. §742 in direct conflict with 12 U.S.C. §548 by removing all purpose to be served by the latter provision.

Petitioners pretend that only one method of arriving at the value of bank stock may be utilized under Texas law: the "book value" method. Under the book value method, the aggregate value of a bank's shares is determined by summing the amounts shown on the bank's financial statement for capital, surplus, undivided profits, and certain reserves. The value of the bank's real property is then deducted from this total to prevent its double taxation. The remainder rep-

resents the total value of all the bank's shares. The bank would then be taxed on the value of its real property and the shareholders on the value of their shares.

Neither Article 7166 nor its successor statutes dictate a particular method or computation to be used in appraising bank stock. The Texas statutes require only that the market value of the real property owned by the bank be subtracted from the actual cash value of the bank's stock. "There is no exclusive method for determining the fair cash market value of bank stock." TEX ATT'Y GEN. OP. NO. WW-1208 (1961).

Petitioners, then, would ignore the "market" method of assessing bank stock in order to distort book value calculations. Under the more accurate market method, the value of bank stock is determined by identifying what a share has sold for recently in the open market. This selling price is multiplied by the number of shares outstanding to arrive at a total value of the bank's stock. Again, the value of the bank's real property is subtracted from this total. The remainder represents the total taxable value of the bank's shares, which is divided proportionately among the shareholders.

The market method is professionally accepted as the preferred method of appraisal. The book value method is used only as a guide in arriving at market value, and then only if market information is unavailable. The tax assessor must adjust the book value upward or downward if he has knowledge that it does not reflect true market value. Indeed, the market value of bank stock usually exceeds its book value. See TEXAS STATE PROPERTY TAX BOARD, GENERAL APPRAISAL MANUAL §12, Appraisal of Financial Institutions, at FI-6 to FI-8 (1980).

By its own terms, 31 U.S.C. §742 is inapplicable both to Article 7166 and to the accepted practices of assessing

bank stock under Texas law. The exemption of federal obligations extends only to those "forms of taxation that would *require* that . . . the obligations . . . be *considered* . . . in the *computation* of the tax . . ." (emphasis added). Whether the tax is computed using the market method or the book value method, consideration of federal obligations is neither required nor optional, but is instead irrelevant. Hence, "the plain language of the statute, its origin, and its purpose"[2] permit Texas' present form of taxation of bank stock.

C. The interpretation of 31 U.S.C. §742 sought by Petitioners would necessarily limit other forms of state and local taxation, disrupting the tax structures of the various states.

In his amicus curiae brief, on Writ of Certiorari, the Solicitor General observes that if not for the enumeration of explicit exceptions in the 1959 amendment, state franchise and inheritance taxes could no longer apply to federal obligations. Since taxation of bank shares is not included in this list, the Solicitor General deduces that the value of bank stock must now be reduced by the amount of United States securities held by the bank. (Amicus Br. of Solicitor General 15-16). This conclusion cannot be reached without overruling the distinction in property interests recognized in *Van Allen, supra.* "The question in this case is whether the amended statute has legislatively overturned the decisions that concededly would have upheld the Texas statute prior to 1959" (Amicus Br. of Solicitor General 17).

Under a franchise or inheritance tax, any federal securities under consideration are owned by the taxpayer himself. But in the instant case, the federal securities of a bank are not owned by the taxpayer-shareholder but by the banking corporation. *Van Allen, supra,* and its progeny have no

2. *Nat'l Muffler Dealers Assn. v. United States,* 440 U.S. 472, 477 (1979).

application to a corporate franchise tax or an inheritance tax. Without these statutory exceptions, the exemption of United States obligations would expand into these forms of taxation. But because a bank shareholder does not own the federal obligations owned by his bank, no similar exception is necessary for the tax in question. The absurdity of an opposite reading can best be illustrated from the examples provided by the Solicitor General.

Clearly a state could not impose inheritance taxes on a bequest of federal government bonds without the statutory exception in the 1959 amendment. Under the interpretation offered by the Solicitor General, the value of any taxable stock must be reduced to the extent that it is enhanced by corporate investments in federal obligations. Therefore, an inheritance of stock in such a corporation would also be exempt from state inheritance taxes, but for the federal statutory exception.

Similarly, the Solicitor General cites two other forms of taxation that are limited without exception by the 1959 amendment. "[S]tate gift taxes cannot be applied to gifts of government bonds made after 1959," nor can a state now impose its income tax on gains from the sale of United States bonds (Amicus Br. of Solicitor General 16). It must follow from his treatment of Texas' bank stock tax that a state would also be prohibited from taxing a gift of stock in a corporation that heavily invested in federal securities. Likewise, a state or local income tax could not apply to an individual who realized dividend income or a gain from the sale of stock in such a corporation.

It is clear from the legislative record that Congress had no intention to so limit, if not disrupt, the tax structures of the states. Absent entirely from the history of the 1959 amendment is any discussion whatsoever of these consequences. Yet if *Van Allen, supra*, has been overturned, then

such results must necessarily flow from the repeal of the shareholder-corporation distinction.

CONCLUSION

For all of the reasons stated herein, your Amici respectfully urge this Court to reject the contention of Petitioners and uphold the decisions of the courts below.

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CERTIFICATE OF SERVICE

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary public in and for the State of Texas, on this day personally appeared C. Richard Fine, who being by me duly sworn upon oath, stated:

I, C. Richard Fine, am a member of the Bar of the Supreme Court of the United States and am counsel of record for the following:

Texas Association of Appraisal Districts
Texas Association of School Boards
Texas Association of School Administrators
Texas Council of School Attorneys
Texas Municipal League

By filing this Brief as Amici Curiae, I hereby enter an appearance in this cause pending before the United States Supreme Court.

I further state upon oath that on the 14th day of January, 1983, I served copies of the foregoing Brief of Amici Curiae on Petitioners, American Bank and Trust Company, et al., and Respondents, Dallas County, et al., and Respondents, City of Dallas, et al., by depositing the same in the United States Mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to wit:

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SUBSCRIBED AND SWORN TO before me by the said C. Richard Fine, on this the 14th day of January, 1983.

Notary Public in and for the State of Texas

Brief for the United States

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No. 81-1717

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
PETITIONERS

v.

DALLAS COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state property tax on bank shares computed on a bank's net assets without any deduction for tax-exempt United States obligations violates Rev. Stat. 3701 (now enacted as 31 U.S.C. 3124).

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The original opinion of the court below (Pet. App. 44a-52a), withdrawn upon rehearing, is not reported. The opinions of the court below upon first and second motions for rehearing (Pet. App. 6a-30a, 30a-36a) are reported at 615 S.W.2d 810 and 823. The memorandum opinions in the related cases included in the petition for a writ of certiorari (Pet. App. 1a, 40a) are not reported.

JURISDICTION

The judgments of the court below were entered on January 23, 1981 (Pet. App. 37a, 41a), and June 3, 1981 (Pet. App. 2a). Petitions for rehearing were denied on May 1, 1981 (Pet. App. 38a, 42a), and July 1, 1981 (Pet. App. 3a). Applications for writs of error to the Supreme Court of Texas were denied on January 6, 1982 (Pet. App. 4a, 39a,

43a). The petition for a writ of certiorari was filed on March 17, 1982, and was granted on November 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. 548 and Article 7166 of Texas Revised Civil Statutes Annotated (Vernon 1960)[1] are set forth at Pet. 3-4.

Rev. Stat. 3701 (31 U.S.C. 742[2]), as amended by Section 105(a) of the Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622, to add the second sentence, provided as follows:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or

---

[1] Article 7166 was repealed effective January 1, 1982, but was succeeded by similar provisions of the new Texas Property Tax Code (Pet. 3 n.4).

[2] 31 U.S.C. was not enacted until September 13, 1982. The unenacted 31 U.S.C. 742, unlike Rev. Stat 3701, included the introductory phrase "Except as otherwise provided by law," substantially relied upon by the court below. By Pub. L. No. 97-258, 96 Stat. 877, enacted Sept. 13, 1982, the Congress "restate[d] in comprehensive form, without substantive change, certain general and permanent laws related to money and finance and * * * enact[ed] those laws as title 31, United States Code." H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 1 (1982). In the newly enacted Title 31, Rev. Stat. 3701 became Section 3124(a), reformulated "without substantive change" to provide as follows (Pub. L. No. 97-258, 96 Stat. 945),:

> § 3124. Exemption from taxation
>
> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except—
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

STATEMENT

These suits were instituted in a state court in Dallas County, Texas, by a number of banks, state and national, principally located in Dallas County, and by shareholders in those banks individually and, in one of the cases, in a representative capacity. They sought mandamus and declaratory and injunctive relief against Dallas County and other taxing subdivisions of the State of Texas, and officers and Boards of Equalization of those taxing subdivisions, with respect to the assessed values on the basis of which an annual ad valorem tax on bank shares for 1979 was imposed. (Pet. ii-vii; Pet. App. 6a-7a, 44a-46a.)

Article 7166 of Texas Revised Civil Statutes Annotated (Vernon 1960) then required each bank doing business in the State to make returns of its real estate to the local tax assessor, and at the same time to submit a sworn list of its shareholders, with the address and number of shares of each. The shareholders were required to make return of their shares "at their actual value" to the tax assessor where the bank was located, and each share was to be taxed at the difference between "its actual cash value" and the proportionate amount per share at which the bank's real estate was assessed. The statute further provided that the tax upon the shares should be a lien thereon, and that the bank should not pay any dividends to a shareholder in default in payment of taxes on his shares, or permit transfer on its books of shares the owner of which was in default

in payment of his taxes.[3] (Basically similar provisions remain in effect under the new Texas Property Tax Code. See note 1, *supra*.)

In determining the "actual cash value" of shares of bank stock subject to tax, respondents totalled the capital accounts of a bank, subtracted the assessed value of its real estate, and divided the results by the number of shares outstanding. They did not eliminate from capital accounts the value of obligations of the United States owned by the bank (Pet. App. 14a-15a). Petitioners asserted that Rev. Stat. 3701 (31 U.S.C. 742) required that the value of the bank shares be reduced by the value of the obligations of the United States held by the bank.[4] They asked that the assessed values be reduced accordingly (Pet. App. 6a-7a, 14a-15a, 44a, 48a, 51a-52a).

The trial court denied relief (Pet. App. 7a, 44a). The Court of Civil Appeals, agreeing with two decisions of the Supreme Court of Montana,[5] reversed (Pet. App. 44a-52a). It held that "the plain language of [31 U.S.C.] section 742 as amended exempts United States obligations from being

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[3] Under a number of state statutes taxing bank shares, the banks have been required in the first instance to make payment of the tax on their shareholders. See, e.g., *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103, 109-112 (1923). In recognition of this fact, and of the fact that many banks, whether required or not, paid the tax, section 164(e) of the Internal Revenue Code of 1954 (26 U.S.C.) allows the bank, if unreimbursed by its shareholders, to take the deduction for taxes paid. See *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (argued Nov. 1, 1982). The record in this case indicates that some or all of the petitioner banks, because of the provisions against stock transfers and dividend declarations when payment of the tax is in default, requested that they be billed for the aggregate taxes on their shares outstanding, and paid the taxes. J.A. 16, 44-48, 52-55, 58-60, 69.

[4] Petitioners also asserted that the tax imposed by art. 7166 had been repealed by Tex. Rev. Civ. Stat. Ann. art. 7150.6 (Vernon Cum. Supp. 1981), exempting most intangible property from taxation; or if not, that the Texas Constitution prohibited treating bank shares differently from other intangible property. The court rejected those claims (Pet. App. 6a-14a, 46a-48a).

[5] *Montana Bankers Association* v. *Montana Department of Revenue*, 117 Mont. 112, 580 P.2d 909 (1978); *First Security Bank* v. *Montana Department of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978).

considered in the computation of any state or municipal or local tax. The tax here in question is illegal because United States obligations were included in determining the actual cash value of the property to be taxed" (Pet. App. 50a).

On motions for rehearing the court set aside its earlier judgment, and affirmed the judgment of the trial court (Pet. App. 5a, 6a-29a). It had become convinced that the decisions of the Montana Supreme Court were unsound because that court had not considered 12 U.S.C. 548 (Rev. Stat. 5219) which, it asserted, consents to the local taxation of national banks or bank shares, and had also ignored the initial clause of 31 U.S.C. 742, which began: "Except as otherwise provided by law * * *."[6] The court pointed out that in a series of decisions, this Court had held that the predecessor of 12 U.S.C. 548 (originally Section 41 of the National Bank Act, ch. 106, 13 Stat. 111) permitted state taxation of shares of national banks without reduction in value because of obligations of the United States held by the banks. *Van Allen* v. *The Assessors*, 70 U.S. (3 Wall.) 573 (1866); *Des Moines Bank* v. *Fairweather*, 263 U.S. 103 (1923); cf. *Society for Savings* v. *Bowers*, 349 U.S. 143, 147-148 (1955). It concluded that the clause introducing 31 U.S.C. 742 referred to 12 U.S.C. 548, and that since that clause had not been eliminated by the 1959 amendment to Section 742, the consent given by 12 U.S.C. 548 had not been withdrawn (Pet. App. 16a-22a). The court reached the same conclusion on the alternative ground that repeals by implication are not favored, and that the legislative history of the 1959 amendment showed no intention to withdraw the consent given in 12 U.S.C. 548 (Pet. App. 23a-27a). The court also rejected an argument that the Texas statute discriminated against obligations of the United States because it allowed a deduction for real estate but not for federal obligations (*id.* at 28a).

Petitioners moved for a further rehearing, asserting that the court's reliance upon 12 U.S.C. 548 was misplaced; it had been amended in 1969 simply to provide: "For the pur-

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[6] The court referred to this clause as the opening clause of Rev. Stat. 3701 (Pet. App. 16a). As noted above, note 2, it appears only in the unenacted 31 U.S.C. 742.

poses of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized * * * under the laws of the State or other jurisdiction within which its principal office is located." Act of Dec. 24, 1969, Pub. L. No. 91-156, Section 2, 83 Stat. 434. The court denied the motion, stating that tax exemptions should be strictly construed against the party asserting the exemption (Pet. App. 31a), and that "the purpose of the 1969 amendment was to broaden rather than to restrict the authority of state and local governments to tax national banks" (Pet. App. 32a). The Supreme Court of Texas denied applications for writs of error (*id.* at 4a, 39a, 43a). Petitioners then sought review in this Court, which granted their petition limited to the question whether Tex. Rev. Civ. Stat. Ann. art. 7166 (Vernon 1960) violated Rev. Stat. 3701 (31 U.S. 742) by not allowing a deduction for tax-exempt United States obligations.

SUMMARY OF ARGUMENT

Rev. Stat. 3701, as amended in 1959, exempted United States obligations from any taxes whose computation would, either directly or indirectly, consider such obligations. The assessments here were based on the capital accounts of each bank, which included obligations of the United States. Even if the tax had been based on the selling price of bank shares, that price would reflect, at least indirectly, the obligations of the United States held by a bank. Thus, the plain language of Rev. Stat. 3701 proscribes the taxes in question here.

Until the 1959 amendment of Rev. Stat. 3701, the decisions of this Court had fixed a well-defined pattern for cases of this kind. When state taxes were imposed on a corporation—with respect to its property or its capital—obligations of the United States had to be eliminated from the tax base. On the other hand, when the tax was on shares owned by the shareholders, the value of United States obligations held by the corporation could be included in the taxable value of the shares.

The 1959 amendment of Rev. Stat. 3701 was designed to make obligations of the United States more attractive in-

vestments. To carry out that purpose, Congress enlarged and made more specific the preexisting exemption of United States obligations from state and local taxation. The amended statute expressly stated that only "franchise or other nonproperty taxes" on corporations, and "estate taxes or inheritance taxes," would be permitted; any other tax that considered obligations of the United States either directly or indirectly—for example, a gift tax on tax-exempt bonds—would fall before the amended exemption.

The court below sought to evade the plain language of the amended Rev. Stat. 3701 by stressing the introductory clause of the unenacted 31 U.S.C. 742 ("Except as otherwise provided by law * * *") and 12 U.S.C. 548, to which it believed that clause referred. But the clause on which the court relied has never been a part of the statute. Moreover, the states' authority to tax bank shares (whether state or national) does not depend on 12 U.S.C. 548, and that statute offers no answer to the question whether state taxes may include the value of federal obligations when doing so may interfere with the conduct of federal functions.

ARGUMENT

TEXAS'S BANK SHARE TAX IS INCONSISTENT WITH REV. STAT. 3701

Rev. Stat. 3701, as amended in 1959, provided that the exemption of obligations of the United States from state or local taxation "extends to *every form of taxation that would require* that either *the obligations* or the interest thereon, or both, *be considered, directly or indirectly, in the computation of the tax*" (emphasis added). While the Texas statute required that each share of bank stock be taxed at "its actual cash value" (reduced by its proportionate interest in the bank's real estate), and while this Court has pointed out that the value of a share of stock in a going business is usually determined by its selling price (*United States* v. *Cartwright*, 411 U.S. 546, 551 (1973)), the assessments that are challenged in this case were based upon "the capital accounts of the bank, subtracting therefrom the assessed value of real estate and dividing by the number of

shares" (Pet. App. 48a; see also *id.* at 15a).[7] This Court has consistently held that where a tax on a corporation is imposed on, or measured by, its capital, the tax is upon, or measured by, obligations of the United States held by the corporation. *Society for Savings* v. *Bowers*, 349 U.S. 143 (1955); *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865); *Bank of Commerce* v. *New York City*, 67 U.S. (2 Black) 620 (1863). In the assessments here in question, therefore, the obligations of the United States were "considered directly or indirectly, in the computation of the tax[.]" Moreover, removing the obligations of the United States held by the bank would undoubtedly affect the "actual cash value" or selling price, of the bank's shares; thus those obligations would necessarily be considered—if not directly, at least indirectly—in the computation of the tax. The court's original opinion therefore correctly concluded that the plain language of Rev. Stat. 3701—as amended in 1959—prohibited the assessments challenged by the petitioners. The legislative history of the 1959 amendment reenforces this conclusion.

A. Until 1959 States Were Permitted To Include Obligations Of The United States Held By Corporations When Taxing Shareholders, But Not When Taxing The Corporation

This Court in *Weston* v. *Charleston*, 27 U.S. (2 Pet.) 449 (1829), held that a tax on specified forms of property held in the City of Charleston could not be imposed upon obligations of the United States, since the tax would operate upon the constitutional authority of the United States to borrow money, and would constitute "a burden on the operations of government" (*id.* at 468). That decision was fol-

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[7] In *Bartow County Bank* v. *Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), appeal docketed, No. 81-1834 (Apr. 5, 1982), the Georgia statute imposed the tax upon the "fair market value" of shares, but added, "which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, [and] appropriated retained earnings * * *." 285 S.E.2d at 922.

lowed in two cases involving New York taxes on state chartered banks. In *Bank of Commerce* v. *New York City*, *supra*, 67 U.S. (2 Black) at 620, 629, the tax was upon the capital of the bank; in the *Bank Tax Case*, 69 U.S. (2 Wall.) 200, 200 (1865) (emphasis omitted), the tax was "on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings * * *." In each case the Court held that the amount on which the tax was computed must be reduced by the value of United States obligations held by the bank.

Beginning in 1862 Congress passed seven statutes authorizing the Secretary of the Treasury to borrow large amounts on credit of the United States.[8] In slightly variant terms, each provided either that obligations of the United States generally, or the obligations authorized by that statute, should be exempt from taxation by state or local authority.[9] The statutory exemption was made general, and permanent, by Section 3701 of the Revised Statutes:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Meanwhile Congress had passed the National Bank Act (ch. 106, 13 Stat. 99)[10] authorizing the incorporation of national banks and making detailed provisions for their organization, financial structure, and powers. Among other things, Section 40 of the Act (13 Stat. 111) required officers of a national bank to compile, and make available to "officers authorized to assess taxes under state authority," a

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[8] The first six were during the Civil War; the seventh, in 1870, authorized refunding of the existing debt. Act of Feb. 25, 1862, ch. 33, 12 Stat. 345; Act of Mar. 3, 1863, ch. 73, 12 Stat. 709; Act of Mar. 3, 1864, ch. 17, 13 Stat. 13; Act of June 30, 1864, ch. 172, 13 Stat. 218; Act of Jan. 28, 1865, ch. 22, 13 Stat. 425; Act of Mar. 3, 1865, ch. 77, 13 Stat. 468; Act of July 14, 1870, ch. 256, 16 Stat. 272.

[9] The statutes are listed, and the exempting provisions quoted, in *Smith* v. *Davis*, 323 U.S. 111, 117 n.7 (1944).

[10] An earlier version, in the Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, was repealed by Section 62 of the National Bank Act, ch. 106, 13 Stat. 118, and did not contain the later provisions regarding state or local taxation.

list of shareholders. Section 41 (13 Stat. 112) provided that nothing therein should prevent taxation of such shares under state authority.[11]

New York then passed a law enabling state banks to become national banks, and imposing a personal property tax on the owners of shares in national banks. In *Van Allen* v. *The Assessors*, 70 U.S. (3 Wall.) 573 (1866), a shareholder in the First National Bank in Albany, the capital of which was wholly invested in bonds of the United States, challenged the power of the State to tax his shares. The Court held that since the state had imposed no comparable tax on state banks or their shareholders, the tax violated the second proviso of Section 41. But the Court noted that the defect could be remedied by state legislation (70 U.S. (3 Wall.) at 581), and proceeded to consider the "main and important question involved," whether the value of shares subject to tax must be reduced by the amount of the obligations of the United States held by the banks. On that question, the Court was "satisfied that the States possess the power to tax the whole of the interest of the shareholder," and that "the State assessors [need not] institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares" (*id.* at 588).

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[11] The concluding clauses of Section 41 (13 Stat. 112), later set forth with but slight changes in Rev. Stat. 5219, were as follows:

> *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further*, That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks authorized under authority of the state where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed.

Almost ninety years later, the Court recognized that these early decisions had established a pattern that had been consistently maintained. *Society for Savings* v. *Bowers*, 349 U.S. 143, 144-148 (1955). When state taxes had been imposed upon a corporation—with respect to its property or its capital—obligations of the United States had to be eliminated from the tax base.[12] But when the tax was on shares owned by the shareholders, then (absent discrimination[13]) there was no requirement that the taxable value of the shares be reduced by the value of the obligations of the United States held by the corporation.[14] As the Court put it in the *Van Allen* case, *supra*, the state assessors were not required to inquire into the investments of the corporation.[15]

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[12] *Banks* v. *Mayor*, 74 U.S. (7 Wall.) 16 (1869); *Home Savings Bank* v. *Des Moines*, 205 U.S. 503 (1907); *Farmers & Mechanics Savings Bank* v. *Minnesota*, 232 U.S. 516 (1914); *New Jersey Realty Title Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Society for Savings* v. *Bowers*, *supra*.

[13] *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U.S. 113 (1935).

[14] *People* v. *Commissioners*, 71 U.S. (4 Wall.) 244 (1867); *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353 (1870); *Mercantile Bank* v. *New York*, 121 U.S. 138 (1887); *Cleveland Trust Co.* v. *Lander*, 184 U.S. 111 (1902); *Des Moines Bank* v. *Fairweather*, *supra*, 263 U.S. at 103.

[15] There is a suggestion in the opinion of the court below that the power of a state to tax shares in a national bank derived from the first proviso in Section 41 of the National Bank Act (Rev. Stat. 5219), and that this was construed to apply to the shares of other corporations, specifically state banks (Pet. App. 16a-21a). That proviso, however, did little more than echo the concluding paragraph in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436-437 (1819) (emphasis added): "This opinion does not deprive the States of any resources which they originally possessed. *It does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State.* But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Indeed, as this Court recognized in *Society for Savings* v. *Bowers*, *supra*, 349 U.S. at 147, though the doctrine that shareholders' inter-

B. The 1959 Amendment to Rev. Stat. 3701 Was Intended To Assure The Investment Attractiveness Of Obligations Issued By The United States

On June 8, 1959, President Eisenhower requested that the Congress—in the interest of effective management of the public debt and of enhanced marketability of obligations of the United States—remove the existing 3.26% interest ceiling on savings bonds and the 4.25% ceiling on Treasury bonds of maturities exceeding five years, increase the public debt limit, and approve "certain other technical proposals." The President stated that he had requested the Secretary of the Treasury to transmit legislation for those purposes. 105 Cong. Rec. 10163-10164 (1959). The Secretary transmitted a proposed bill, Section 5(a) of which was ultimately enacted without change as Section 105(a) of Pub. L. No. 86-346, 73 Stat. 622, adding a second sentence to Rev. Stat. 3701. *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before The House Comm. on Ways and Means*, 86th Cong., 1st Sess. 76, 80 (1959) ("*House Hearings*").

The Secretary appeared before the Ways and Means Committee on June 10, 1959, and—after extended testimony and a Supplemental Statement on the public debt, interest rates, and the competition for investment funds in the capital markets (*House Hearings*, *supra*, at 2-66)—submitted a written statement with respect to proposed Section 5. The statement (*House Hearings*, *supra*, at 69-72) informed the Committee that the State of Idaho was requiring, for purposes of its individual income tax, that interest on obligations of the United States be included in

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ests might be taxed without making any deductions for government bonds held by the corporation "had its origin in cases involving national bank stock[,]" the result reflected the theory, applicable to corporations generally, "that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets * * *." If, however, the Congress should wish to give greater protection or enhanced marketability to government obligations, there is no reason to doubt its power to do so. *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232 (1952); *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21 (1939).

gross income. Idaho attempted to justify this by arguing that its tax was not on the exempt income, but "'upon every individual * * * measured by his net income.'" The Treasury and the Department of Justice thought the distinction "without substance," but concluded that "the simplest resolution of the matter would be through Congressional action which would clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local taxes. The proposed provision would accomplish that purpose." *Id.* at 71. The statement on proposed Section 5 concluded (*id.* at 72):

> In these circumstances, we believe it to be highly desirable for the Congress to make the exemption statute more specific at this time. If positions such as Idaho has held are adopted by other States the resulting taxation could have a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals, and could have undesirable effects on Treasury financing operations in general.

On August 25, 1959, the President renewed his request for prompt action by Congress. 105 Cong. Rec. 17033-17034 (1959). The Report of the House Ways and Means Committee on the bill stated: "the bill makes it clear that both the principal and interest on U.S. obligations are exempt from all State taxes except nondiscriminatory franchise, etc., taxes." After referring to the position of "one State," it added that "[t]he new sentence makes it clear that the exemption now provided by section 3701 extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporation taxes [*sic*] and except estate taxes or inheritance taxes." H.R. Rep. No. 1148, 86th Cong., 1st Sess. 2, 8, 12 (1959). The Report of the Senate Finance Committee repeated these statements. S. Rep. No. 909, 86th Cong., 1st Sess. (1959).

There was extended floor debate on the bill in both the House[16] and the Senate,[17] principally regarding the ceilings on interest rates. Only brief mention was made of the exemption for government bonds in the introductory summaries by Chairman Mills of the House Ways and Means Committee[18] and Chairman Byrd of the Senate Finance Committee.[19] Public Law No. 86-346 was approved on September 22, 1959, and added the second sentence to Rev. Stat. 3701. 73 Stat. 621, 622.

C. The 1959 Amendment Exempts Bank Shares From State Taxes Insofar As Their Value Is Enhanced By Federal Obligations Held By The Banks

The legislative history of the 1959 amendment to Rev. Stat. 3701 did not explicitly state that the amended statute was designed to overturn a consistent line of decisions that had had its origin almost a hundred years earlier, or to produce any specific result other than frustrating Idaho's attempt to subject the interest on government bonds to its personal income tax.[20] A reluctance to accept any broader purpose appears to have influenced the Texas Court of Appeals (Pet. App. 23a), and the Supreme Court of Georgia in *Bartow County Bank*, *supra*, 285 S.E.2d at 927. But "the plain language of the statute, its origin, and its purpose"[21] were there to be perceived. This Court had noted earlier "the long established Congressional intent to prevent taxes

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[16] 105 Cong. Rec. 18154-18157, 18157-18174, 18842, 19377-19383 (1959).

[17] 105 Cong. Rec. 18380, 18477-18484, 18510-18541, 18542-18545, 18549-18556, 18556-18564, 18710, 19260-19267 (1959).

[18] 105 Cong. Rec. 18157 (1959).

[19] 105 Cong. Rec. 18479 (1959).

[20] Legislation was hardly required for that purpose. The prospect of sustaining Idaho's position in litigation could hardly have been regarded as promising. *Miller* v. *Milwaukee*, 272 U.S. 713 (1927); *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U.S. 136 (1927).

[21] *National Muffler Dealers Association* v. *United States*, 440 U.S. 472, 477 (1979).

which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith* v. *Davis*, 323 U.S. 111, 117 (1944). While Congress did not grant all of the flexibility in interest rates and enhanced marketability that the President and the Secretary sought, the committee reports endorsing Section 105(a) of the bill gave notice that barriers to marketability in many forms of state taxation were to be removed.

The amendment Congress enacted states: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes of inheritance taxes" (Rev. Stat. 3701). Two aspects of the amendment denote the scope of its operation. First, the sweeping quality of its language is inconsistent with implied exceptions.[22] Second, the explicit statement of exceptions demonstrates an awareness that, but for the enumeration, the amendment would have overturned some results made long familiar by the decisions of this Court.[23] State franchise taxes on corporations, measured either by property of the corporation or by its net income, have consistently been permitted to include in their taxable measure obligations of the United States or the interest on such obligations.[24] Similarly, state inheritance

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[22] Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

[23] Cf. *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

[24] *Society for Savings* v. *Coite*, 73 U.S. (6 Wall.) 594 (1868); *Provident Institution* v. *Massachusetts*, 73 U.S. (6 Wall.) 611 (1868); *Hamilton Co.* v. *Massachusetts*, 73 U.S. (6 Wall.) 632 (1868); *Home Insurance Co.* v. *New York*, 134 U.S. 594 (1890); *Educational Films Corp.* v. *Ward*, 282 U.S. 379 (1931); *Werner Machine Co.* v. *Director of Taxation*, 350 U.S. 492 (1956). *Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929), once thought to cast doubt upon earlier decision, has been said by this Court to be without precedential value. *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 382 (1960); *United States* v. *City of Detroit*, 355 U.S. 466, 472 n.2 (1958). For a federal tax on doing business in corporate form measured by net in-

taxes have long been imposed upon a bequest of federal government bonds.[25] In each case, the value of the bonds, or the income therefrom, would necessarily be considered in the computation of the tax, and would therefore come within the exemption but for the stated exceptions. The exceptions make it clear, therefore, that the draftsmen of the 1959 amendment were fully aware that in areas not excepted, the new statute would substantially expand the exemption of obligations of the United States from state taxation.

We may note a few changes in earlier accepted results that the plain language of the amendment appears to make. Gift taxes on gifts of tax-exempt bonds have been upheld on the same reasoning that has supported the application of estate and inheritance taxes—that the tax was not "on" the exempt bond, but on the transfer.[26] But the bonds must obviously be considered in the computation of the gift tax, and gift taxes are not excepted from the operation of the amended statute. Presumably, therefore, state gift taxes cannot be applied to gifts of government bonds made after 1959. Similarly, this Court has held that gain on the sale of municipal bonds is subject to the federal income tax,[27] and by a parity of reasoning, a state before 1959 could presumably have imposed its income tax on gains from the sale of bonds of the United States. That is no longer possible if, as seems more than likely, the bonds must be considered directly or indirectly in the computation of tax.

Indeed, the decision of the Supreme Court of Rhode Island in *Federal Products Corp.* v. *Norberg*, 429 A.2d 447 (1981), well illustrates the sweep of the amendment. Rhode Island has an unobjectionable tax on corporate net income

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come that includes interest on municipal bonds, see *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911).

[25] *Plummer* v. *Coler*, 178 U.S. 115 (1900). Cf. *Orr* v. *Gilman*, 183 U.S. 278 (1902); *Greiner* v. *Lewellyn*, 258 U.S. 384 (1922).

[26] Cf. *Hamersley* v. *United States*, 16 F. Supp. 768 (Ct. Cl. 1936), cert. denied, 300 U.S. 659 (1937); *Phipps* v. *Commissioner*, 91 F.2d 627 (10th Cir.), cert. denied, 302 U.S. 742 (1937). Cf. *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929).

[27] *Willcuts* v. *Bunn*, 282 U.S. 216 (1931).

that does not include interest on obligations of the United States. But for corporations doing business in other states as well as in Rhode Island, the State employs an allocation formula to determine the part of the corporation's net income subject to its tax. One factor in the formula is gross income realized in Rhode Island compared to overall gross income, and solely for allocation purposes, the interest on government bonds is included in gross income to determine the fraction of net income (from which interest on government bonds is excluded) subject to Rhode Island's tax. The plain language of Rev. Stat. 3701, as amended, now appears to prohibit consideration of the income from bonds of the United States in any stage of the computation of the tax, and the Supreme Court of Rhode Island so held.

These examples, and others that could be suggested, demonstrate that the plain language of the amended Rev. Stat. 3701 broadens substantially the pre-existing exemptions of obligations of the United States from state and local taxation. Nothing in the committee reports endorsing that language is inconsistent with that expanded exemption. The question in this case is whether the amended statute has legislatively overturned the decisions that concededly would have upheld the application of the Texas statute prior to 1959.

As we have pointed out above, pages 7-8, the assessments that are challenged in this case were based on the capital accounts of each bank (less the assessed value of the real estate) (Pet. App. 48a), and this Court has held that a tax so assessed is a tax "upon the property constituting the capital."[28] Obligations of the United States were therefore, contrary to the provisions of Rev. Stat. 3701, considered directly or indirectly in the computation of the tax. Moreover, even if the assessments had been based on the "actual cash value" of the shares subject to tax, the obligations of the United States held by the banks must inevitably have contributed to the value of the shares, and must therefore have been considered indirectly in the computation of the tax. Cf. *McWilliams* v. *Commissioner*, 331 U.S. 694,

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[28] *Bank of Commerce* v. *New York City*, 67 U.S. (2 Black) 620, 629 (1863).

702-703 (1947).[29] Indeed, the court below in its original opinion acknowledged that the plain language of the statute required the exclusion of obligations of the United States in computing the taxable value of bank shares (Pet. App. 50a). And in reaching a different result on rehearing, it purported only to discover implicit, rather than explicit, limitations on the operation of the amended Rev. Stat. 3701. We turn now to consider those limitations.

D. The Implicit Limitations on Rev. Stat. 3701 Relied On By The Court Below Have No Foundation In The Terms Or The History Of The Statute

On rehearing the court below upheld the assessments challenged here. The court incorrectly believed that 12 U.S.C. 548 (Rev. Stat. 5219) had historically authorized state and local taxation of bank shares, including the portion of their value represented by federal obligations (Pet. App. 16a-21a).[30] It also concluded that (*id.* at 21a):

> the initial words of section 3701, "Except as otherwise provided by law," * * * obviate[ ] any difficulty that might otherwise exist in reconciling the provisions of section 5219 with the 1959 amendment to section 3701. The consent provided by section 5219 is "otherwise provided by law," and, therefore, falls within the exception to the exemption.

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[29] In the recent enactment of Title 31 by Pub. L. No. 97-258, 96 Stat. 877 (see note 2, *supra*), and the reformulation of Rev. Stat. 3701 as 31 U.S.C. 3124(a) (96 Stat. 945), the words "directly or indirectly" were omitted. The House Judiciary Committee, in reporting the bill favorably, explicitly stated that the bill was intended to make no substantive changes, and the agencies to which it was submitted agreed. H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 1-6, 94 (1982).

[30] Rev. Stat. 5219 was amended in 1969 to the form now appearing in 12 U.S.C. 548. The court below referred to "section 5219 as it existed in 1959, when section 3701 was amended, because our primary question turns on the meaning of section 3701" (Pet. App. 16a n.5). The version of Rev. Stat. 5219 effective in 1959 is reproduced at Pet. App. 55a-57a. Because 12 U.S.C. 548 was in effect in its current version at the time the taxes at issue here were assessed, and because the 1969 amendment of Rev. Stat. 5219 expands—if anything—the authorization given by that section, we refer throughout to 12 U.S.C. 548.

Finally, the court (*id.* at 23a) attributed an improperly narrow scope to the 1959 amendment of Rev. Stat. 3701.

There is no reason to assume that the taxation of any bank's shares (whether the bank is national or state) is conditioned on 12 U.S.C. 548.[31] As we have noted above, n. 15, the taxation of national bank shares by the states was approved in *M'Culloch* v. *Maryland*, *supra*, even in the absence of statutory permission. Such taxation is "authorized" by 12 U.S.C. 548 only in the sense that the statute declares that it does not prohibit state taxes. A fortiori there is no requirement—constitutional or otherwise—for authorization of a state tax on the shares of a state bank. As this Court noted in *Society for Savings* v. *Bowers*, *supra*, 349 U.S. at 147, the decisions dealing with taxation of bank shares reflect the fact that a shareholder's interest is a separate property interest, whether the corporation is a national bank, a state bank, or another type of corporation.

It is an entirely separate question, however, whether the state taxation of state or national bank shares interferes with the conduct of a federal function. It was that question which this Court considered in the cases relied on by the court below (Pet. App. 17a-20a). See *Van Allen* v. *Assessors*, *supra*, 70 U.S. (3 Wall.) at 585, cf. *Cleveland Trust Co.* v. *Lander*, *supra*, 184 U.S. at 113-115. That is also the question addressed by the 1959 amendment to Rev. Stat. 3701, which now directs a conclusion different from the one that had long prevailed.

The court below also erred in believing that the phrase "Except as otherwise provided by law" incorporated in Rev. Stat. 3701 the (nonexistent) statutory exception decreed by 12 U.S.C. 548. The phrase to which the court referred was never a part of Rev. Stat. 3701, either before or after 1959. See 73 Stat. 622. It did introduce the unenacted 31 U.S.C. 742, published in 1926.[32] But as this Court

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[31] That statute does, of course, authorize taxation of national banks themselves. See *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339 (1968).

[32] Even if the introductory clause of 31 U.S.C. 742 had been enacted, there was no reason to assume that it referred to Rev. Stat.

pointed out in *Stephen* v. *United States*, 319 U.S. 423, 426 (1943), "the Code cannot prevail over the Statutes at Large when the two are inconsistent." See also *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379-388 (1958); *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964). When Congress finally enacted Title 31 this year, it omitted the phrase from 31 U.S.C. 3124(a) (96 Stat. 945), which reformulates Rev. Stat. 3701 without substantive change. See note 2, *supra*.

Nor was there any justification for the court below to find that the 1959 amendment did not apply to bank shares (Pet. App. 23a). The amendment contained its stated exceptions and, as we have noted above, pages 15-17, evinced a congressional awareness that the change in language effected a broader exemption. There is no warrant for judicial multiplication of unstated exceptions. *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979).

5219. Rather, the cross-reference inserted by the draftsmen most likely referred to the Act of Aug. 13, 1894, ch. 281, 28 Stat. 278, which had legislatively overruled *Bank* v. *Supervisors*, 74 U.S. (7 Wall.) 26 (1869), and modified Rev. Stat. 3701 to the extent of removing the exemption from circulating notes of national banks, United States legal tender notes, and other notes circulating as currency. See W. McClenon & W. Gilbert, *Index to the Federal Statutes, 1874-1931* 1243 (1933), listing the Act of Aug. 13, 1894 as an implied amendment of Rev. Stat. 3701. Messrs. McClenon and Gilbert were with the Library of Congress's Legislative Reference Service, and in the preface to the 1926 edition of the Code (at v), "[a]cknowledgement of valuable assistance is given to W.H. McClenon * * *."

CONCLUSION

The judgments of the court below should be reversed.

Respectfully submitted.

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No. 81-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

v.

DALLAS COUNTY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas

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REPLY BRIEF FOR PETITIONERS

Rev. Stat. 5219 Is Not An Exception To Rev. Stat. 3701

Respondents and their supporting amici curiae rely on Rev. Stat. 5219, which provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Respondents also rely on the version of Rev. Stat. 5219 that existed in 1959 when Rev. Stat. 3701 was amended. In that version Congress provided for states to tax national banks in certain specified ways.[1] One of those

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[1]The predecessor versions of Rev. Stat. 5219, all of which deal with the taxation of national banks, are reproduced at Petition Appendix pp. 53a-57a.

methods was the taxation of the outstanding shares of national banks.

Respondents and their amici argue that in both versions of Rev. Stat. 5219 Congress consented to the imposition of share taxes that consider national or state bank-owned United States obligations in the computation of the tax.[2] Respondents contend that Rev. Stat. 5219 creates a special rule for banks through an exception to the prohibition contained in Rev. Stat. 3701. Thus, respondents claim that notwithstanding the language of Rev. Stat. 3701, this tax is not in violation of that statute.[3]

Respondents' special-rule-for-banks theory stems from a misreading of the Court's decision in *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866). In *Van Allen* the Court struck down a New York tax upon shares in a national bank because no similar tax was imposed on state banks, and thus the tax violated the requirement of Rev. Stat. 5219 (as it existed only between 1864 and 1868) that national

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[2]Brief for City of Dallas respondents, pp. 6-7, 10, 16-17, 20-21; Brief for Richardson Independent School District respondents, p. 7. Brief for State of Georgia amicus, pp. 3, 7-8, 14-15; Brief for City of Houston amicus, pp. 2-3, 12-13; Brief for Nueces County amici, pp. 9-12; Brief for Texas Ass'n of Appraisal Districts amici, pp. 7-8, 9. *See also* Brief for Dallas County respondents, pp. 25-26.

[3]Respondents' theory presumes that the pre-1959 versions of Rev. Stat. 5219 and Rev. Stat. 3701 were in conflict, that is, that Rev. Stat. 5219 consented to what Rev. Stat. 3701 prohibited. But such a conflict was rejected by this Court in *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 115 (1902) wherein the Court held there is "no want of harmony" between Rev. Stat. 3701 and Rev. Stat. 5219. More recently, the Court has found that no other federal statute provides an exception to Rev. Stat. 3701. *Memphis Bank & Trust Co. v. Garner*, 459 U.S. ___ (January 24, 1983).

bank shares could be taxed only to the extent state bank shares were taxed. This Court went on, however, to decide the question of whether United States obligations had to be deducted in computing the share tax. The Court found no deduction was required because a tax upon shareholders is not a tax upon the bank's assets.[4]

The Court then addressed other theories of the plaintiffs in error, one of which was that as a question of statutory interpretation, the word "shares" as used in the 1864 version of Rev. Stat. 5219 was intended by Congress only to mean the portion of the shares not represented by United States obligations. After examining the statute the Court concluded that Congress did not intend a special meaning for the word "shares", and thus there was no authority for engrafting an exception to the rule that a tax upon shares is not upon corporate assets. 70 U.S. at 588

The *Van Allen* case and its progeny did not hold, as respondents suggest, that Rev. Stat. 5219 (in any of its versions) consented to the state taxation of United States obligations owned by national banks. Rev. Stat. 5219 defines the extent to which national banks are within the taxing power of the states. It does not address the computation of state taxes as does Rev. Stat. 3701. In *Home Savings Bank v. Des Moines,* 205 U.S. 503, 518 (1907), the Court stated:

> The Van Allen Case has settled the law that a tax upon the owners of shares of stock in corporations, in re-

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[4]As petitioners have already shown, this distinction has significance only in light of the then existing prohibition against taxes upon United States obligations. The distinction has no bearing on the expanded prohibition now contained in Rev. Stat. 3701 against taxes which take those obligations into account as well as taxes upon the obligations. *See* Brief for Petitioners, pp. 12-20.

> spect of that stock, is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the Congressional permission, or upon shares of state corporations by virtue of the power inherent in the state to tax the shares of such corporation.

The ground of the *Van Allen* case on which subsequent share tax cases relied was this corporate-shareholder distinction, not some alleged consent to tax United States obligations if owned by a bank. *Des Moines National Bank v. Fairweather,* 263 U.S. 103 (1923); *Cleveland Trust Co. v. Lander,* 184 U.S. 111 (1902); *People v. Commissioners,* 71 U.S. (4 Wall.) 244 (1867). *See also, Society for Savings v. Bowers,* 349 U.S. 143 (1955); *Home Savings Bank v. Des Moines,* 205 U.S. 503 (1907); *Owensboro National Bank v. Owensboro,* 173 U.S. 664 (1899).[5]

Respondents' theory that there is a special rule for national banks regarding share taxes which consider corporate owned United States obligations has been spe-

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[5]Even if *Van Allen* had held Rev. Stat. 5219 was an exception to Rev. Stat. 3701, by reason of its use of the word "shares", there still remain three infirmities in respondents' theory. First, *Van Allen* and Rev. Stat. 5219 dealt only with national banks, and respondents have not explained why the clear prohibition of Rev. Stat. 3701 would not apply to state bank share taxes. Second, if the prohibition does apply to state bank share taxes, then it now applies also to national banks because they must now be taxed as state banks are taxed under Rev. Stat. 5219. Third, in 1969 Rev. Stat. 5219 was completely revised and the word "shares" was excluded from the current version. Because respondents are relying on a case interpreting words of a statute that no longer exists, their *Van Allen* theory cannot be translated to the current version of the statute even as to national banks.

cifically rejected by this Court. In *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923) the Court held that a share tax could consider bank-owned United States obligations because of the shareholder-corporate distinction announced in *Van Allen*, saying that as "respects national banks, the rule is the same as with corporations in general." 263 U.S. at 112.

A more fundamental problem with respondents' theory is that it is divorced from the language of any existing statute. Rev. Stat. 5219 only permits national banks to be taxed as state banks are taxed, and Rev. Stat. 3701 deals only with the treatment of United States obligations. Neither statute even suggests a special tax rule for United States obligations owned by a state or national bank.[6] And respondents' theory ascribes to Congress an astonishing intent: United States obligations are exempt from any form of taxation which considers them in computing a tax — unless they are owned by a bank. No congressional purpose could be served by discouraging banks from owning United States obligations, and no such purpose is evidenced by either Rev. Stat. 3701 or Rev. Stat. 5219.[7]

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[6]Some respondents and their amici claim that petitioners are arguing that the 1959 amendment to Rev. Stat. 3701 repealed Rev. Stat. 5219. Brief for City of Dallas respondents, pp. 16-17, 19; Brief for Nueces County amici, pp. 5, 8-11; Brief for Texas Ass'n of Appraisal Districts amici, pp. 8, 10. Petitioners make no such claim. Indeed, other respondents recognize and petitioners agree that if United States obligations are not considered in computing these taxes, there will still remain share tax liability regarding many banks' shares. Brief for Dallas County respondents, p. 16.

[7]In the legislative history to the 1959 amendment to Rev. Stat. 3701, members of Congress complained that banks held too few United States obligations. 105 Cong. Rec. 18516-18517 (1959).

The Plain Meaning of Rev. Stat. 3701 Prohibits the Tax Assessed by Respondents

Respondents and their amici rely primarily on Rev. Stat. 5219, but in several ways they do attempt to explain away the prohibition contained in Rev. Stat. 3701.

1. Dallas County respondents and certain of their amici advance the theory that Rev. Stat. 3701 only prohibits taxes which "require" that United States obligations be "considered" in the computation of the tax; that Art. 7166, Tex. Rev. Civ. Stat., does not "require" that United States obligations be considered; and that therefore the tax assessed by respondents does not violate Rev. Stat. 3701.[8] These respondents claim, in effect, that although they considered United States obligations, the tax as assessed does not violate Rev. Stat. 3701 because Art. 7166, Tex. Rev. Civ. Stat., does not "require" them to consider those obligations. Under this theory, local tax assessors could lawfully accomplish that which the state legislature is expressly prohibited from accomplishing. Thus, a state law which simply provided that local assessors "may tax property they deem appropriate" would permit local assessors to tax United States obligations directly because such a statute does not *require* United States obligations to be taxed. Such a theory makes the prohibition contained in Rev. Stat. 3701 meaningless.

The term "required" in Rev. Stat. 3701 is only relevant when the statute itself is being challenged; petitioners do not challenge the state statute itself, but rather the manner in which it was administered by respondents at the local level. Whether or not United States obligations are re-

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[8]Brief for Dallas County respondents, pp. 8-11; Brief for Nueces County amici, pp. 13-14; Brief for Texas Ass'n of Appraisal Districts amici, pp. 11-12.

quired to be considered is not relevant where, as here, they were *in fact* considered. As the Court held in *First National Bank of Gulfport v. Adams,* 258 U.S. 362 (1922), when "the validity of [a tax] assessment by officers of the state is properly challenged, and the matter comes here, this court must determine the effect of the thing *actually done.* What might have been done under the local statute is not controlling." *Id.* at 364 (emphasis added).[9]

2. Respondent Dallas County also contends that "considered" as used in the statute means "a conscious direction of thought"[10] rather than "taken into account". Because "considered" refers to a tax, which is incapable of mental process, "a conscious direction of thought" cannot be the appropriate sense of the word "considered". But Dallas County claims it makes sense when read with the word "required". Under this theory, Rev. Stat. 3701 only prohibits statutes which command tax assessors to think about United States obligations in computing the tax. As petitioners have already shown, however, the statutory term "required" is not operative in this case because respondents *in fact* "considered" United States obligations.

The Dallas County respondents' interpretation of "considered" makes the prohibition contained in Rev. Stat. 3701 turn on a tax assessor's state of mind rather than the nature of the tax. Under that theory a tax assessor who taxed all property with a blind eye to its nature would not violate Rev. Stat. 3701, while one who made a deduction for United States obligations would violate Rev. Stat. 3701

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[9]Respondents argue that they could have computed the tax differently, but that issue is not present here. Alternate methods of assessment are only relevant where the state statute itself is challenged; in that situation alternate methods address how the statute could be administered without violating federal law. *See, e.g., Society for Savings v. Bowers,* 349 U.S. 143 (1955).

[10]Brief for Dallas County respondents, pp. 4, 8-9.

because he thought about those obligations when he made the deduction.[11]

The United States Treasury's concern over the adverse impact of these taxes on the federal government's borrowing power[12] stems from the tax, not the assessor's state of mind. Thus, "considered" must be read in its ordinary and plain meaning of "taken into account". Because the tax assessed by respondents takes the banks' United States obligations into account, it considers those obligations in violation of Rev. Stat. 3701 as amended in 1959. *See* Brief for Petitioners, pp. 13-20.

3. While not suggesting what the word "considered" means, City of Dallas respondents claim that pre-1959 cases had always forbidden taxes which "considered" United States obligations, and therefore the 1959 amendment must not have altered the law.[13] The flaw in this argument is that prior to 1959, share taxes which "considered" United States

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[11]Other statutes dealing with taxes also use the term "considered" as "taken into account." In defining what is ordinary income, Internal Revenue Code § 64 provides in part:

> For purposes of this subtitle, the term 'ordinary income' includes any gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b). Any gain from the sale or exchange of property which is treated or *considered* [i.e. taken into account in computing] . . . 'ordinary income' shall be treated as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231(b) (emphasis added).

Here, as with Rev. Stat. 3701, "considered" only makes sense when read as "taken into account". State of mind is not relevant in either statute.

[12]See Brief of United States as Amicus Curiae (September 1982), p. 7.

[13]Brief for City of Dallas respondents, pp. 15-16; *See also*, Brief for Tex. Ass'n of Appraisal Districts amici, pp. 4-5.

obligations were expressly permitted. *See* Brief for Petitioners, pp. 13-14. In *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 112 (1923) the Court held that a share tax calculated with "controlling consideration" given to the net assets of the bank, which included United States obligations, did not violate Rev. Stat. 3701 as it then existed because of the *Van Allen* distinction between a tax upon the corporate assets and one upon the shares. The Court further recognized that Rev. Stat. 3701 left "no authority for taxing [a United States obligation] to the bank, but only for taking it into account in valuing the shares." *Id.* at 116.

Contrary to the assertion by City of Dallas respondents, pre-1959 law had permitted exactly what the 1959 amendment to Rev. Stat. 3701 now forbids.

4. Respondents and their amici do not otherwise suggest what the language of Rev. Stat. 3701 means; they offer no alternative to the language's plain meaning which forbids the tax assessed here. Respondents do contend that because the legislative history of Rev. Stat. 3701 does not mention bank share taxes, the amendment must not have been intended to change the law and therefore the law was not changed.[14] Respondents ignore the plain language of

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[14]Brief for City of Dallas respondents, pp. 17-20; Brief for Dallas County respondents, pp. 17-24. Some respondents and an amicus also argue that because a committee report on the bill which amended Rev. Stat. 3701 refers to the amendment as one to "clarify" the tax exempt status of United States obligations, it must not have been intended to alter pre-1959 law, notwithstanding the plain meaning of the statute. Brief for Dallas County respondents, pp. 18-19; Brief For Texas Ass'n of Appraisal Districts amici, pp. 4-5. But their emphasis on the word "clarify" is misplaced. Congress often uses the term "clarify" when it is substantively changing the law – for example, the 1969 amendment

(Cont'd.)

the statute in favor of the silence of Congress. But the "meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485 (1917). This is particularly true where, as here, the plain meaning of the statute furthers the purpose of the bill of which the amendment was a part, and is otherwise consistent with the statutory scheme. *See* Brief for Petitioners pp. 16-20; Brief for United States as Amicus Curiae in Support of Petitioners, pp. 12-20.

5. The State of Georgia amicus claims, in the alternative, that if Rev. Stat. 3701 forbids this tax, then petitioners should not be permitted to deduct the entire amount of the banks' United States obligations.[15] But the entire value of United States obligations must be disregarded in arriving at a corporation's taxable net value. *See, e.g., New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U.S. 665 (1950). Georgia points to no language in the statute that authorizes a state tax which considers only part of the United States obligations.

A full or partial deduction is not the issue; States may not consider United States obligations in computing a local tax. Share taxes measured by net assets cannot take United States obligations into account in determining the assets from which the liabilities are subtracted. Thus, the banks' United States obligations must be disregarded in making up the estimate of taxable net values.

(Cont'd.)

to Rev. Stat. 5219, which drastically altered the manner in which states could tax national banks, was referred to by Congress as "An Act to *clarify* the liability of National banks for certain taxes." Act of Dec. 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 (emphasis added).

[15]Brief for State of Georgia amicus, pp. 18-21.

Conclusion

The 1959 amendment to Rev. Stat. 3701 is not subject to the implied exception the respondents and their amici attempt to graft upon its prohibition. On the other hand, giving effect to the ordinary meaning of the statute's words reflects the sense in which this Court and others had used those words in describing share taxes measured by net assets, is consistent with the statutory scheme, and achieves the purpose of the Congressional bill of which it was a part.

The 1959 amendment forbids local taxes which consider, or take into account, United States obligations in the computation of the tax. Respondents used the banks' assets (other than real estate) less liabilities to measure the taxable value of the shares in the petitioner banks. In computing the tax respondents refused to make any deduction for United States obligations held among the banks' assets. The tax assessed by respondents considers those obligations in the computation of the tax and therefore violates the prohibition of Rev. Stat. 3701.

For the reasons discussed above and in Brief for Petitioners, the tax assessed by respondents should be declared in violation of Rev. Stat. 3701 (31 U.S.C. § 742), and the judgments of the court below should be reversed.

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Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

REPLY BRIEF FOR RESPONDENTS DALLAS COUNTY, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

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March 19, 1983

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No. 81-1717

In The

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN BANK AND TRUST COMPANY, ET AL.,
Petitioners

v.

DALLAS COUNTY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

REPLY BRIEF FOR RESPONDENTS DALLAS COUNTY, JOHN CHILDS, TAX ASSESSOR-COLLECTOR FOR DALLAS COUNTY, TEXAS, THE BOARD OF EQUALIZATION OF DALLAS COUNTY, AND ITS MEMBERS, GARRY A. WEBER, JIM JACKSON, NANCY JUDY, JIM TYSON, AND ROY ORR, THE GARLAND INDEPENDENT SCHOOL DISTRICT, AND J. W. WALLS, TAX ASSESSOR-COLLECTOR FOR THE GARLAND INDEPENDENT SCHOOL DISTRICT

ARGUMENT

PETITIONERS HAVE NOT ACCURATELY STATED THE ARGUMENT OF RESPONDENTS

By inadvertance or misunderstanding if not by design, the Petitioners continue to erroneously assert the position of Respondents.

For example, on page 2 of the Reply Brief of Petitioners it is stated that: "Respondents and their amici argue that in both versions of Rev. Stat. 5219 Congress consented to the imposition of share taxes that consider national or state bank-owned United States obligations in the computation of the tax." Respondents' position is and always has been that bank stock is taxable at its cash value as provided in Tex. Rev. Civ. Stat. Ann. art. 7166, and that the amount of federal obligations owned by some other taxpayer, i.e., a bank, is not material and was not considered in computing the shareholder's tax. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866).

On page 6 of Reply Brief of Petitioners, it is stated: "These respondents claim, in effect, that although they considered United States obligations, the tax as assessed does not violate Rev. Stat. 3701 . . ." The Respondents have never taken such a position. Throughout the Reply Brief for Petitioners, a lack of understanding of Respondents' brief and position is demonstrated. Respondents' position is that the property being taxed is property owned by a shareholder as a separate property interest and, therefore, what type of assets are owned by the bank is not material. *Van Allen v. The Assessors*, Id.

The formula used to arrive at cash value of bank stock does not consider the makeup of bank-owned personal property, and the tax assessor did not even have that information before him. See example on pages 12 and 13, Brief of Respondents Dallas County, et al.

TEXAS STATUTES NOT CHALLENGED

Petitioners state (Reply Brief, page 6) that they do not challenge the Texas statutes themselves, but rather the

manner in which they were administered. Respondents take this as a conclusive abandonment of their previous position (J. A. 17-19) that the statutes themselves violate federal law or are unconstitutional. Having taken that position, they cite *First National Bank of Gulfport v. Adams*, 258 U.S. 362 (1922), for the proposition that the state statute is not relevant. However, in the *Gulfport* case, the tax in question was assessed against the bank, rather than the stockholders, and thus was clearly illegal, and therefore, what was required by the local law was not in question. In the present case, 31 U.S.C. §742 only prohibits a tax which *requires* consideration of United States obligations. To prevail, the Petitioners must show that the tax did so require. Surely, Petitioners do not really mean (as stated in their Reply Brief, pages 6-7), that, "Whether or not United States obligations are required to be considered is not relevant. . . ." It can only be irrelevant if the statutory language is ignored.

THE MEANING OF "CONSIDERED"

Petitioners misstate the position of Respondents on the meaning of the term "considered". As stated in the brief of Dallas County, et al. (page 8), "consider" may mean "give heed to". This does not imply a state of mind, as Petitioners insist. It means that the tax is forbidden only if the computation of the tax requires the tax assessor to give heed to the amount of United States obligation owned by the bank. As shown in Respondents' Brief (pages 8, 12, 16), the tax assessor did not need to know whether or not the bank even owned any such obligations in order to calculate the tax, and did not give any heed to such amounts if they *were* known.

The Petitioners then argue that under such reasoning, a tax which required deduction of such obligations would

violate 31 U.S.C. §742 because it "considered" federal obligations. Of course, this argument is fallacious for two reasons. First, it would apply equally to the Petitioners' definition of "considered". Deducting federal obligations certainly is taking them into account. Second, the argument ignores the first sentence of the statute:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

NO EVIDENCE OF ADVERSE IMPACT

Petitioners continue to assert that this tax has "adverse impact on the federal government's borrowing power", but as Respondents have previously stated, there is nothing in the record of any of these causes to suggest any such adverse impact. This is not a matter of law; rather it is an unproven allegation of fact about which Petitioners presented no evidence at all. It is merely *assumed* by Petitioners and by their amici, that upholding a tax which has been in effect for about a century will suddenly have an adverse impact. It is *assumed* that a tax on shares of stock owned by shareholders, which remains the same no matter what the character or type of personal property owned by the bank, will somehow discourage banks from purchasing United States obligations. It is *assumed* that the tax somehow causes the United States to pay higher interest on such obligations, in spite of the fact that (according to Petitioners) only a few states have this tax, and thus, hardly can control the market for such obligations. It is *assumed*, without any evidence, that but for the tax, obligations will be more marketable.

Respondents believe these unproved assumptions to be unwarranted and illogical, and they are not part of the

record before this Court. On the contrary, the evidence reveals that the Banks now invest very heavily in United States securities with the tax in existence. The Bank of Texas owned 3.4 times its equity capital or net worth in United States obligations. (See Respondents' Brief, p. 14: $2,632,078 equity capital and $8,960,000 in United States obligations.)

IGNORING LEGISLATIVE HISTORY

Petitioners continue to overlook the legislative histories of both 31 U.S.C. §742 and 12 U.S.C. §548 and would have the Court do likewise. Respondents believe the histories to weigh heavily in favor of the legitimacy of the tax in question, and ask that the histories be given careful consideration.

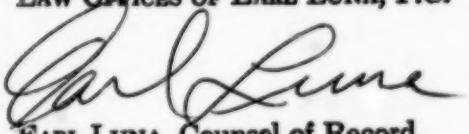
CONCLUSION

The tax imposed under the authority of the Tex. Rev. Civ. Stat. Ann. art 7166 and its successors does not violate 31 U.S.C. §742, and specifically does not require the consideration of United States obligations in its calculation.

The tax should be declared to be legal and in compliance with federal law, and the judgments of the Courts below should be affirmed.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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Attorney for Respondents Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson, and Roy Orr, The Garland Independent School District, and J. W. Walls, Tax Assessor-Collector, for the Garland Independent School District

CERTIFICATE OF SERVICE IN CAUSE NO. 81-1717

I, Earl Luna, counsel of record for Respondents, Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served three copies of Respondents' Dallas County, John Childs, Tax Assessor-Collector for Dallas County, Texas, The Board of Equalization of Dallas County, and its members, Garry A. Weber, Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, The Garland Independent School District and J. W. Walls, Tax Assessor-Collector for the Garland Independent School District, Reply Brief on each of the attorneys for the several parties hereto, by personal delivery or mailing of three copies with first-class postage prepaid, addressed to counsel of record at the following addresses:

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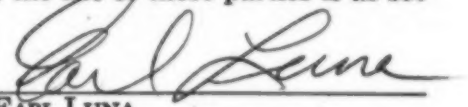
It is further certified that all parties required to be served have been served, and that the list of those parties is as set forth above.



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Docket Sheet

NO. 81-1717-CSX	TITLE American Bank and Trust Company, et al., Petitioners v. Dallas County, et al.

DOCKETED	COURT
March 17, 1982	Court of ~~Civil~~ Appeals of Texas, Fifth Supreme Judicial District

DATE	PROCEEDINGS AND ORDERS
	Counsel for petitioners: Marvin S. Sloman
	Counsel for respondents: H. Lou Morrison, Jr., Earl Luna Charles M. Hinton, Jr., H. Louis Nichols, Lee E. Holt (Over)
March 17, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 14, 1982	Brief for the respondents, The City of Dallas, et al. in opposition filed.
Apr. 14, 1982	Motion of American Bankers Association for leave to file a brief as amicus curiae filed.
Apr. 15, 1982	Motion of Dale National Bank for leave to file a brief as amicus curiae filed.
Apr. 16, 1982	Brief of respondents Dallas County, et al. in opposition filed.
Apr. 19, 1982	Memorandum of respondents Richardson Independent School District, et al. in opposition filed.
Apr. 17, 1982	Brief of respondent City of Garland, Texas in opposition filed.
Apr. 21, 1982	DISTRIBUTED. 5-13.
Apr. 23, 1982	Reply brief for the petitioners filed. (D).
May 10, 1982	Opposition of respondents to motion of American Bankers Association for leave to file a brief as amicus curiae filed.
May 10, 1982	Opposition of respondents to motion of Dale National Bank for leave to file a brief as amicus curiae filed.
May 17, 1982	The Solicitor General is invited to file a brief in this case expressing the views of the United States. O'Connor, J., OUT.
Sept. 22, 1982	Brief, amicus curiae, for the U. S. filed.
Sept. 29, 1982	DISTRIBUTED. 10-15.
Sept. 30, 1982	Reply brief for petitioner to Brief for the U. S. as amicus curiae filed. (D).
Oct. 12, 1982	Reply brief for respondents to Brief for the U. S. as amicus curiae filed. (D).
Oct. 13, 1982	Respondents' reply to brief for the U. S. as amicus curiae filed. (D).
Oct. 13, 1982	Respondents' reply to petitioners' reply to Brief for the U.S. as amicus curiae filed. (D).
Oct. 13, 1982	Motion of The Texas Association of Appraisal Districts, et al. for leave to file a brief as amici curiae filed.
Oct. 13, 1982	DISTRIBUTED. 10-15. (Above motion).
Oct. 18, 1982	The motion of Texas Association of Appraisal Districts, et al. for leave to file a brief as amici curiae is DENIED. O'Connor, J., OUT. (Over)

81-1717

Title

No.

DATE	PROCEEDINGS AND ORDERS
	Counsel for respondents cont'd: Henry D. Akin, Jr.
Oct. 25, 1982	DISTRIBUTED. 10-29.
Nov. 1, 1982	The motion of American Bankers Association for leave to file a brief as amicus curiae is GRANTED. The motion of Dale National Bank for leave to file a brief as amicus curiae is GRANTED. The petition for a writ of certiorari is GRANTED limited to Question 1 presented by the petition. O'Connor, J., OUT.

Dec. 15, 1982	Motion of Dale National Bank for leave to file brief as amicus curiae filed.
Dec. 16, 1982	Brief of petitioners' American Bank and Trust Co., et al. filed.
Dec. 16, 1982	Joint appendix filed.
Dec. 15, 1982	Motion of the American Bankers Association for leave to file a brief as amicus curiae filed.
Dec. 21, 1982	Brief for the U. S. as amicus curiae filed.
Dec. 29, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec. 30, 1982	Motion of respondents for divided argument filed.
Jan. 10, 1983	The motion of Dale National Bank for leave to file a brief as amicus curiae is GRANTED. The motion of American Bankers Association for leave to file a brief as amicus curiae is GRANTED. O'Connor, J., OUT.
Jan. 14, 1982	Brief for respondents Dallas County, et al., filed.
Jan. 17, 1983	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED. The motion of respondents for divided argument is GRANTED. O'Connor, J., OUT.
Jan. 15, 1983	Brief for respondents, The City of Garland, et al. filed.
Jan. 15, 1983	Motion of The Texas Association of Appraisal Districts, et al. for leave to file a brief as amici curiae filed.
Jan. 15, 1983	Brief, amicus curiae, for the City of Houston filed.
Jan. 14, 1983	Brief of respondents The City of Dallas, et al. filed.
Jan. 18, 1983	Brief of respondents Richardson Independent School Dist., et al. filed.
Jan. 14, 1983	Brief, amicus curiae, of Nueces County Texas and City of Corpus Christi Texas filed.
Jan. 25, 1983	CIRCULATED.
Feb. 22, 1983	The motion of Texas Association of Appraisal Districts, et al. for leave to file a brief as amici curiae is GRANTED. O'Connor, J., OUT.
March 15, 1983	Reply brief for the petitioners filed. (D). (American Bank and Trust).

NO. 81-1717-CSX	TITLE American Bank and Trust Company, et al., Petitioners, v. Dallas County, et al.

DOCKETED	COURT
March 17, 1982	Court of Appeals of Texas, Fifth Supreme Judicial District

DATE	PROCEEDINGS AND ORDERS
March 21, 1983	Reply brief for respondents Dallas County, et al. filed. (D).
March 22, 1983	Supplemental brief for respondents Dallas County, et al. filed. (D).
March 29, 1983	ARGUED.